Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

MARGUERITE A. JOHNSON, PETITIONER

v.

ORLANDO J. GEORGE, JR., AND DELAWARE TECHNICAL AND COMMUNITY COLLEGE

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

I. Is petitioner charged with violating school policy and insubordination denied procedural or substantive due process when her employer denied her an opportunity to marshal her own evidence, refused to provide her a grievance hearing, failed to give notice of the evidence against her and then conducted a coercive, one-sided investigation which produced a fabricated report engineered solely to justify her discharge?

II. Have the federal courts below undermined the summary judgment procedure by deciding for themselves----instead of letting a factfinder determine----crucial fact questions about whether petitioner committed the charged misconduct, whether respondents' investigation was fair, unbiased and complete and whether it properly concluded that petitioner had violated school policy?

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The unpublished opinion of the Court of Appeals for the Third Circuit in *Marguerite A. Johnson v. Orlando J. George, Jr., and Delaware Technical and Community College*, C.A. No. 07-2758, dated November 14, 2008, and reported at 299 Fed. Appx. 139(3rd. Cir. 2008), affirming the district court's grant of summary judgment in favor of the respondents, is set forth in the Appendix hereto(App. 1-7).

The unpublished opinion of the U.S. Magistrate for the District Court for the District of Delaware in *Marguerite A. Johnson v. Orlando J. George, Jr., and Delaware Technical and Community College* , C.A. No. 05-157-MPT, dated June 11, 2007, and reported at 2007WL 1697276, granting summary judgment in favor of the respondents, is set forth in the Appendix hereto(App. 8-37).

The unpublished Order of the United States Court of Appeals for the Third Circuit in *Marguerite A. Johnson v. Orlando J. George, Jr., and Delaware Technical and Community College* C.A. No. 07-2758, filed January 26, 2009, denying the petitioner's petition for rehearing with suggestion for rehearing *en banc*, is set forth in the Appendix hereto(App. 38-39).

The investigative report of the Santora Baffone CPA Group, dated April 12, 2005, concluding that the petitioner had deviated from certain guidelines in the course of her employment, is set forth in the Appendix hereto(App. 40-53).

The report of the Hearing Officer Vincent A. Bifferato, dated July 19, 2005, concluding that petitioner be terminated for cause, is set forth in the Appendix hereto(App. 54-58).

JURISDICTION

The judgment of the United States Court of Appeals for the Third Circuit affirming the District Court grant of summary judgment was entered on November 14, 2008(App. 1). Its further order denying petitioner's timely filed petition for panel rehearing with suggestion for rehearing *en banc* was filed and decided January 26, 2009(App. 38-39).

This petition for writ of certiorari is filed within ninety (90) days of January 26, 2009. 28 U.S.C. § 2101(c).

The jurisdiction of this Court is invoked pursuant to the provisions of 28 U.S.C. § 1254(1).

RELEVANT PROVISIONS INVOLVED

United States Constitution, Amendment V:

> ...nor shall private property be taken for public use without just compensation.

United States Constitution, Amendment VII:

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise

> reexamined in any Court of the United States, than according to the rules of the common law.

United States Constitution, Amendment XIV, Section 1:

> ...No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law....

28 U.S.C. Section 1331:

> The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

28 U.S.C. Section 1343(a)(4):

> (a) The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:
> ...
> (3) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights.....

Civil Rights Act–42 U.S.C. Section 1983:

> Every person who under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of

the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress....

Fed. R. Civ. P. 56(c) and (e)(2):

(c). Serving the Motion; Proceedings.
....The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.
....

(e)(2). Affidavits; Further Testimony.
....*Opposing Party's Obligation to Respond.* When a motion for summary judgment is properly made and supported, an opposing party may not rely merely on allegations or denials in its own pleading; rather, its response must—by affidavits or as otherwise provided in this rule---- set out specific facts showing a genuine issue for trial. If the opposing party does not so respond, summary judgment should, if appropriate, be entered against that party.

Excerpts of Professional Standards of the American Institute of Certified Public Accountants-----Agreed-Upon Procedures Engagements:

Procedures to be Performed

Section .16 The practitioner should not agree to perform procedures that are overly subjective and thus possibly open to varying interpretations.

....

Written Representations

Section .38 Examples of matters that might appear in a representation letter from the responsible party include the following:

...

d. A statement that all known matters contradicting the subject matter or the assertion and any communication from regulatory agencies affecting the subject matter or the assertion have been disclosed to the practitioner.

....

Knowledge of Matters Outside Agreed-Upon Procedures

Section .40 The practitioner need not perform procedures beyond the agreed-upon procedures. However, in connection with the application of agreed-upon procedures, if matters come to the practitioner's attention by other means that significantly contradict the subject matter (or written assertion related thereto) referred to in the practitioner's report, the practitioner should include this matter in his or her report. For example, if, during the course of applying agreed-upon procedures regarding an entity's

internal control, the practitioner becomes aware of a material weakness by means other than performance of the agreed-upon procedure, the practitioner should include this matter in his or her report.

STATEMENT

Petitioner Marguerite A. Johnson, Ed.D. ("petitioner" or "Dr. Johnson"), has been employed since 1970 by the respondent Delaware Technical and Community College ("the College"), a State institution of higher learning, first as an instructor and then through successive promotions as Vice President and Campus Director for the College's Terry Campus in Dover beginning in 1994. For the next ten years, petitioner consistently received numerous accolades, awards and commendations for her outstanding performance; and she was credited with developing an inclusive, community-friendly atmosphere which allowed the Terry Campus to achieve a new level of effectiveness in educating its students. Each of these years she received a merit increase in salary from the respondent Orlando J. George, Jr. ("George"), the College's President.

In order to inform its full-time employees and administrators of its policies and procedures in the event of suspension or disciplinary action, the College published a so-called Administrator's Personnel Handbook "(the Handbook") which provides *inter alia* that the College's faculty should be free of censorship or discipline for expressing their first amendment rights; and it set up a grievance procedure for those employees whom the College sought to discipline by

either suspension or termination.

During the course of a meeting on November 19, 2004, at the Terry Campus among departmental chairpersons and administrators to discuss reorganizing the College's technical network, petitioner asked various questions of the participants about how this reorganized system would work and its ramifications for the Terry Campus. All of her questions touched matters of public concern, particularly for the Terry Campus, and were put forth in a non-disruptive way.

It was the consensus of the persons attending the meeting that petitioner's questions were relevant and appropriate to the issue of customer service which the College's chief technology officer (Peter Shoudy) admitted had been a problem. After the meeting, Shoudy discussed petitioner's questions with Dan Simpson, then the College's dean of academic affairs. Shoudy felt as if he had been "ambushed" by petitioner's questions. Without seeking an explanation from petitioner, Simpson relayed Shoudy's complaint about petitioner to George, the College's President.

George then notified petitioner in writing on December 8, 2004, that her "antagonistic" questions and demeanor during the meeting demonstrated an unwillingness to support the reorganization of the College's technical network in a public forum and constituted insubordination and a failure to follow school policy. The next day, George met with petitioner and presented her with a choice: she could either voluntarily retire or he would place her on administrative leave while her colleagues and staff were interrogated as part of the College's investigation

into her wrongdoing.

In a letter to George of January 3, 2005, petitioner explained that her questions at the meeting of November 19, 2004, were presented in a non-disruptive manner and addressed matters of public concern not only to the Terry Campus in particular but also to the public at large. As she asserted, "I do not believe that asking for clarification about an area which many of my staff had asked me to explain constitutes insubordination." Citing the progress which the Terry Campus has achieved under her ten-year stewardship, her institutional loyalty of thirty-four (34) years and the personal sacrifices she had made in order to serve the College, petitioner saw no reason to end her association with the College. She declined to accept either of the alternatives suggested by George and instead offered to use the grievance procedure described in the Handbook to resolve this disciplinary issue.

Upon his receipt of petitioner's letter, George rejected petitioner's request for a grievance hearing and immediately placed petitioner on paid administrative leave while the College conducted an investigation "focusing on allegations concerning [her] pattern of behavior over at least the past several years." Petitioner was told to remove personal items from her office and George forbade her from visiting the College's facilities or participating in any functions on or off campus. In addition, she was ordered not to discuss the College's investigation with present or former employees.

On January 4, 2005, the College publicly announced that petitioner had been placed on

administrative leave; her replacement, Dan Simpson, was appointed with full responsibility for the Terry Campus. Besides taking over petitioner's duties, Simpson, a retired State Police officer, started his own investigation of petitioner's conduct throughout January of 2005, interviewing various employees who worked for petitioner, including her secretary, representatives in the financial department and the entire marketing department. Simpson made written summaries of his interviews.

While petitioner was prohibited from communicating with any past or present employees of the College about the facts giving rise to this controversy, those same employees were subject to a cascade of interviews first by Simpson, then by the College's Vice President of Human Relations, then by the College's attorney and finally by the outside CPA hired by the College, David Dwyer ("CPA Dwyer"). All of these rounds of interviews were conducted *not* with a view to interviewing witnesses which supported petitioner or her leadership of the Terry Campus but rather to identifying only those witnesses which undermined petitioner and supported George's goal of terminating petitioner for cause.

Many of these interviews were conducted in George's own office, a coercive setting for any College employee who could offer evidence favorable to petitioner. In fact, the whole purpose of the College's "investigation" was to elicit damaging information about petitioner in order to orchestrate her termination for cause. Moreover, further indicating that petitioner's termination was a forgone conclusion of the College's "investigation," no one suggested interviewing

petitioner herself for her version of the facts; and during his investigation CPA Dwyer was directed only to those witnesses selected by Simpson, i.e., *only* to those employees who could offer evidence unfavorable to petitioner rather than to those employees who could offer evidence favorable to petitioner.

The result of these four rounds of interviews by the College was a written investigative report by the SantoraBaffone CPA Group, dated April 12, 2005, authored by CPA Dwyer("the CPA Report"), concluding that the petitioner in the course of her employment had deviated from certain guidelines set out by the College(App. 40-53). Specifically, after interviewing Dan Simpson's handpicked witnesses who offered only evidence unfavorable to the petitioner, the CPA Report found that petitioner used College personnel for some of her private business, that she "created an atmosphere of intimidation and fear," and that she misused the College's credit card for personal or travel use(App. 42-51).

As the CPA Report concluded,

> [b]ased on interviews with [College] staff and external personnel, review of supporting documentation, and review of existing policies and procedures, there are specific instances where Dr. Johnson deviated from State and [College] policies, charged [the College] for unauthorized/nonbusiness-related travel, and misused [College] personnel and the assets entrusted to her. We recommend that [the College] inform the appropriate state agency as a means of initiating a more in-depth

investigation into these matters.

(App. 52-53).

Petitioner's employment contract with the College provided that her employment could be terminated only for good cause and that such good cause must be supported by affidavits. In the wake of the CPA Report, the College's attorney informed petitioner in writing on April 27, 2005, that the College intended to terminate petitioner's employment based upon "the course of conduct" described in the CPA Report "which constitutes a hazard to the health, safety, and well-being of the college and its employees" as well as petitioner's "administration by fear and intimidation...." According to new rules and procedures adopted by the College especially for the petitioner just the day before, she could request a pre-termination hearing.

On May 5, 2005, petitioner requested a pre-termination hearing in writing, questioned the vague generalities of the charges contained in the College's letter and asked the College's attorney for a more specific description of the charges that would be presented against petitioner because without this information together with a description of the evidence to be presented at the hearing, petitioner could not prepare a defense. The College responded by informing petitioner that retired Superior Court Judge Vincent A. Bifferato, Jr., would be the hearing officer and promising that "[w]ell in advance of the hearing, we will provide you with the names of prospective witnesses who will offer testimony on this issue [of petitioner's administration by fear and intimidation], and provide

additional details concerning the anticipated nature of such testimony."

As the hearing date of June 29, 2005, approached, petitioner cited her lack of subpoena power to compel the attendance of witnesses favorable to her cause and the possibility that the College will retaliate against such witnesses; the College's failure to provide her with instances of her abusive or inappropriate behavior or with its evidence generally; and, consistent with her employment contract, the College's failure to provide her with the affidavits of all persons having knowledge of the reasons for her discharge. The College replied by refusing to guarantee that it would not retaliate against those employees who for testified on petitioner's behalf; by contending that it could not provide petitioner with the specifics of her allegedly abusive, inappropriate behavior since the conduct occurred over a course of many years. As far as the affidavits were concerned, they were produced at the office of counsel for petitioner on the very day of the hearing and long after her counsel had left for the scheduled hearing site, much too late to do petitioner any good.

On July 19, 2005, the hearing officer relying upon the CPA Report issued a written decision that petitioner be terminated for cause inasmuch as the preponderance of evidence showed that she used College personnel and material for personal purposes, abused a college credit card and engaged in abusive behavior towards some of the College's employees(App. 54-58).

In the wake of the hearing officer's decision, petitioner on September 16, 2005, amended her complaint which she had filed earlier that year against the College and George in the federal district court for the District of Delaware seeking relief under 42 U.S.C. § 1983, stemming from the College's attempt to terminate her(App. 9). Her new allegations included the events leading up to and including the College's pre-termination hearing and the hearing officer's decision. She claimed that this entire process violated her free speech rights under the First Amendment and that her protected comments led to her wrongful termination by the College(*Id.*).

Petitioner also claimed that she was denied procedural due process when the College and George placed her on administrative leave without a grievance procedure as provided her in the Handbook, without a fair hearing or a fair opportunity to adduce evidence in her own behalf(*Id.*). She sought declaratory and injunctive relief together with an award of damages from a jury compensating her for her future pay, her pain, suffering, humiliation, embarrassment, and injury to her reputation.

During his subsequent deposition, CPA Dwyer conceded that the CPA Report was *never* intended to be a forensic "audit" upon which a definitive conclusion could be founded about petitioner's conduct. He also admitted that the CPA Report was not a search for truth but rather an agreement to perform certain procedures and make findings within the limits of the agreed upon undertaking. He further acknowledged that the CPA Report did *not* comply with the standards of the American Institute of Certified Public

Accountants (AICPA) because it failed to reflect certain evidence inconsistent with its primary findings that petitioner should be terminated for cause. That is, he investigated only those areas which the College told him to investigate, using only information given him by the College, including its subjective opinions, *omitting all contradictory evidence in petitioner's favor.* Under the agreed upon procedures, CPA Dwyer did not interview anyone who would make positive statements about petitioner and he did not interview petitioner herself since it was outside the terms of his engagement.

Finally, CPA Dwyer disclosed that, contrary to what the College had told petitioner under oath, he had tape recorded all his witness interviews for the CPA Report. This prompted petitioner to locate and transcribe these tapes, recordings which revealed testimony which contradicted the CPA Report and demonstrated that it was a fabricated document inconsistent with the truth.

With discovery in this posture, the matter by agreement was referred to the federal Magistrate for resolution of the respondents' motion for summary judgment, one which contended that petitioner's conduct was not protected under the First Amendment, that her administrative leave did not deprive her of her property or liberty interests and that the process provided her was more than adequate under the circumstances(App. 9). The Magistrate agreed with respondents and granted their summary judgment motion(App. 16-28). Analyzing petitioner's free speech rights under *Garcetti v. Ceballos*, 547 U.S. 410(2006), she first ruled that petitioner was acting solely within

her job duties and not on behalf of the public generally when she questioned Shoudy about the College's IT programs on November 19, 2004, and that her comments did not fall within any first amendment protection as enunciated in *Garcetti*(App. 14-21).

As for the petitioner's procedural due process claims, the Magistrate found them "unsubstantiated"(App. 22-23). She determined that petitioner was given all the process which was due her, i.e., fair notice of the charges and evidence against her, including the CPA Report, prior to the pre-termination hearing together with an opportunity to confront the College's proof and adduce her own evidence at the hearing itself(App. 22-24). In so ruling, the Magistrate wrongly found that the 8-page CPA Report, the centerpiece of the College's proof against petitioner and the principal evidence upon which the hearing officer Bifferato relied, was an "audit...[prepared] in accordance with the standards established by the American Institute of Certified Public Accountants"(App. 13).

Finally, the Magistrate rejected petitioner's emergent substantive due process claim, spawned by new information uncovered during CPA Dwyer's deposition, that the CPA Report was not an "audit" at all but instead a report riddled with errors and fabricated evidence and not undertaken to find the truth but instead to reinforce the predetermined finding that petitioner be terminated for cause(App. 24-26). She concluded that the College's decision to terminate petitioner "cannot be described as malicious, arbitrary, or irrational"(App. 25). As for the CPA Report, petitioner "had over two months to prepare to

rebut the charges and to counter the report....[and] [s]he had the opportunity to present facts and evidence...to address the alleged inaccuracies...."(App. 26).

The court of appeals affirmed this ruling(App. 1-7). Regardless of the fact that petitioner was not given the affidavits of relevant witnesses as required by her employment contract, it determined that the process petitioner received "was more extensive than the process she was due under her employment contract"(App. 4). As for petitioner's substantive due process claim, the appellate repeated the Magistrate's observation that petitioner "had ample opportunity to challenge...[the] inaccuracies [of the CPA Report] by presenting countervailing evidence at the pre-termination hearing"(App. 6). Moreover, the court ruled that all of the other evidence supported the hearing officer's finding that petitioner had converted the College's resources to her own use(*Id.*).

On January 26, 2009, the court of appeals denied petitioner's petition for rehearing with suggestion for rehearing *en banc*(App. 38-39). Petitioner now brings her petition seeking a writ of certiorari to the United States Court of Appeals for the Third Circuit.

REASONS FOR GRANTING THE PETITION

I. The Respondents' Use of Fabricated Evidence To Discharge of Petitioner From Her Position As Vice President and Campus Director Of The Terry Campus Violated Petitioner's Right To Procedural And Substantive Due Process.

Petitioner's discharge from her position as Vice President and Campus Director of the Terry Campus in Dover was carried out by respondents in a carefully orchestrated, planned way so that the result, i.e., petitioner's discharge for cause, was preordained and so that the College's subsequent "investigation" into its own actions concerning her termination would render the conclusion that respondents had acted properly. The entire termination process was accomplished by the College in an atmosphere of feigned authenticity. Yet the contrived nature of this undertaking by respondents to oust petitioner from her job for any reason *or for no reason at all* is revealed by the serial deprivations of due process----both procedural and substantive----which petitioner endured from the moment George put petitioner on administrative leave on January 3, 2005:

1. Petitioner was put on administrative leave without access to a grievance procedure and while the College's investigation began, continued and was completed. She could not talk to any of the College personnel and could not interview them for her own defense. Nor could she even visit the College facilities without prior permission. This caused an unequal and unfair access to relevant witnesses and evidence which

favored the College in its "investigation" and prejudiced petitioner in her effort to discover and adduce evidence for her defense;

2. The College publicly announced to all its employees that petitioner was on administrative leave, impliedly telling them that petitioner had committed some blameworthy conduct and the College ordered its employees not to speak to petitioner thereby making the College's "investigation" one-sided, incomplete and biased, presaging the result which it produced;

3. This one-sided "investigation" by the College, bottomed on the selective and coercive interviews of its own employees, produced the preordained finding that petitioner had abused her position by using College resources for personal reasons, had misused a College-issued credit card and had been abusive to some College employees;

4. The CPA Report, undertaken by the College and authored by CPA Dwyer, was the product of four rounds of interviews of witnesses handpicked by the College's Simpson; and, as Dwyer's later deposition testimony revealed, it was incomplete and "riddled with errors, omissions and contradictory facts" which the College manipulated to affect the decisionmaking process to the detriment of petitioner so that the ultimate conclusions of the report were intrinsically flawed, inherently unreliable, fabricated and incomplete;

5. Prior to the termination hearing with Bifferato, the College refused to cite for petitioner the specifics of testimony or evidence harmful to her and refused to provide affidavits of adverse witnesses until

the day of the scheduled hearing, too late to be of any use to petitioner;

6. At the pre-termination hearing, the College adduced the CPA Report, inaccurately referred to as an "audit," which contains fabrications, misstatements and subjective conclusions of CPA Dwyer who allegedly prepared the report after investigating the claimed financial improprieties of petitioner. CPA Dwyer later admitted that it was *not* an audit at all, much less a forensic audit, was not conducted to determine the truth of the accusations against petitioner, was selectively targeted to identify witnesses who supported the College's version of the facts and whose composition violated AICPA professional standards;

7. At the pre-termination hearing, the College adduced and relied upon this false, fabricated CPA Report and the false, fabricated testimony it contained; and

8. Both the hearing officer and then the Magistrate nevertheless cited the CPA Report, wrongly characterizing it as an "audit" prepared in accordance with AICPA standards and despite its fabrications, misstatements and unfounded subjective conclusions----all in violation of professional accountancy standards----relied upon same as accurate and reliable to conclude that petitioner was rightly discharged for good cause.

Procedural Due Process

All of these procedural deprivations, taken together or in isolation, unfairly slanted the evidence-

gathering part of the termination process and irremediably prejudiced petitioner in her marshaling of evidence helpful to her cause; it deprived her of a meaningful hearing because without fair notice of all the evidence relied upon by the College, she could not confront and cross examine the College's witnesses in a meaningful manner; and without notice at the time of the pre-termination hearing that the CPA Report was fatally contaminated by fabricated evidence, misstatements and the subjective conclusions of selectively targeted witnesses and proof-----to the exclusion of evidence helpful to petitioner, all in violation of AICPA standards-----she could not impeach that report in a persuasive or meaningful way at the hearing. In this way, petitioner was denied procedural due process.

Under the fourteenth amendment, petitioner would be entitled to procedural due process if the property/liberty interest at stake is deemed to be of such magnitude or importance that its loss can fairly be characterized as important; and it depends upon the extent to which the individual will be "condemned to suffer grievous loss." *Morrissey v. Brewer*, 408 U.S. 471, 481(1972) quoting *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 168 (1951)(Frankfurter, J., concurring). *Goldberg v. Kelly*, 397 U.S. 254, 262-263(1970). Petitioner has a cognizable property right in her continued public employment. *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 538;541 (1885)("The point is straightforward: the Due Process Clause provides that certain substantive rights—life, liberty, and property—cannot be deprived except pursuant to constitutionally adequate procedures"). *Barry v. Barchi*, 443 U.S. 55, 69-

70(1979)(Brennan, J., concurring in part). *Board of Regents v. Roth*, 408 U.S. 564, 576-578(1972).

Once it is determined that the Due Process Clause applies to the proceedings below, "the question remains what process is due." *Loudermill*, 470 U.S. at 541 quoting *Morrissey v. Brewer*, 408 U.S. at 481. This Court's decision in *Mathews v. Eldridge*, 424 U.S. 319, 334-335(1976) provides that the process due in any given instance is determined by weighing "the private interest that will be affected by the official action" against the government's asserted interest, "including the function involved" and the burdens the government would face in providing greater safeguards. *Id.* at 335. The *Mathews* calculus then contemplates a balancing of these concerns, through an analysis of "the risk of an erroneous deprivation" of the private interest if the process were reduced and the "probable value, if any, of additional or substitute procedural safeguards." *Id.* See *Hamdi v. Rumsfeld*, 542 U.S. 507, 528-529(2004).

Employing the *Mathews* calculus to the circumstances of this case in order to balance petitioner's legitimate private interest as a public employee not to be discharged unfairly or to have her livelihood threatened with disciplinary action against the College's need for efficient administration, petitioner submits that besides a fair and impartial tribunal, the process due her consists at a minimum of the following:

A. Adequate Notice. Petitioner was entitled to written notice of the charges against her in such specificity as would do her some good in marshaling her own evidence to meet it. *Loudermill*,

470 U.S. at 546("[t]he essential requirements of due process...are notice and an opportunity to respond.") . The notice was required to be of a kind which would reasonably and fairly convey to her the required information so that she could appear and respond effectively with her objections or proof in whatever form was allowed. *Mullane v. Central Hanover Tr. Co.*, 339 U.S. 306, 314(1950). *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1,13-14(1978).

Thus right to cross-examine and confront adverse witnesses and their evidence implies the right to marshal and adduce one's own evidence in support of a position on a contested fact issue such as whether petitioner committed the charged misconduct, whether respondents' investigation was fair, unbiased and complete and whether it properly concluded that petitioner had violated school policy. *Arnett v. Kennedy*, 416 U.S. 134, 142-146(1974)(constitutional minima satisfied *where employee had access to the material upon which the charges was based* and was given a right to respond). *Loudermill, supra.*

B. An Evidentiary Hearing On Contested Fact Issues With An Opportunity To Respond. There were fact questions to be determined by the hearing officer before petitioner could be terminated for cause,, e.g., whether petitioner committed the charged misconduct, whether respondents' investigation was fair, unbiased and complete and whether it properly concluded that petitioner had violated school policy. Considering the financial deprivation flowing from the hearing officer's decision to terminate petitioner and the low tolerance for the risk of a mistaken decision, see *Morrissey v. Brewer*, 408 U.S. at 485-489, these fact

questions could not be resolved by just oral argument or by requiring that the parties submit their respective positions "on the papers." Instead, "[i]n almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross examine adverse witnesses," fully armed with notice of the relevant facts so that the opportunity is a meaningful one. *Goldberg v. Kelly*, 397 U.S. at 269-270 citing *ICC v. Louisville & N. R. Co.*, 227 U.S. 88,93-94(1913) and *Willner v. Committee on Character and Fitness*, 373 U.S. 96, 103-104(1963). See *Arnett v. Kennedy, supra.*

A full evidentiary hearing was required so that the hearing officer was "fully informed" because

> a fully informed decisionmaker might not have exercised its discretion and decided not to [discharge petitioner] notwithstanding its authority to do so. In any event, the termination involved arguable issues, and the right to a hearing does not depend on a demonstration of certain success.

Loudermill, 470 U.S. at 544 citing *Carey v. Piphus*, 435 U.S. 247, 266(1978).

Yet petitioner was denied every opportunity to marshal her own evidence from the College's employees, past and present, by George's prohibition that she not communicate with them while, at the same time, the College carried out four rounds of coercive interviews, targeting employees who would be helpful to its cause while ignoring those witnesses helpful to petitioner. In addition, petitioner lacked the power to

compel the attendance at the hearing of any witness favorable to her cause and the College refused to guarantee that it would not retaliate against those employees who testified on petitioner's behalf, another form of coercion.

The College's vague charges against petitioner lacked specificity and despite repeated requests by petitioner, it never clarified the charges prior to the pre-termination hearing or furnished her with instances of abusive or inappropriate behavior or with its evidence generally. The affidavits of witnesses supporting petitioner's discharge were produced the very day of the scheduled hearing, much too late to do petitioner any good.

This lack of notice undermining petitioner's ability to prepare for the pre-termination hearing was exacerbated by the College's failure to advise petitioner in advance that the CPA Report which it had commissioned CPA Dwyer to prepare and which it intended to introduce into evidence contained factual errors and misstatements and did not comply with AICPA standards. It wasn't until a deposition of Dwyer taken months later incident to this lawsuit that petitioner learned for the first time that the CPA Report was *never* intended to be a forensic "audit" upon which a definitive conclusion could be founded about petitioner's conduct; that it was not a search for truth but rather an agreement to perform certain procedures and make findings thereon; and that it did *not* comply with the standards of the American Institute of Certified Public Accountants (AICPA) because it failed to reflect certain evidence inconsistent with its primary findings that petitioner should be terminated for cause.

In fact, petitioner learned that Dwyer investigated only those areas which the College told him to investigate, using only information given him by the College, including its subjective opinions, *omitting all contradictory evidence in petitioner's favor.* Under the agreed upon procedures, CPA Dwyer did not interview anyone who would make positive statements about petitioner and he did not interview petitioner herself since it was outside the terms of his engagement. Finally, CPA Dwyer disclosed that, contrary to what the College had told petitioner under oath, he had tape recorded all of his witness interviews for the CPA Report, a disclosure which led to further discovery showing that the CPA Report was fabricated, misleading and incomplete.

The College gave petitioner notice of *none* of this salient evidence affecting the integrity of the CPA Report, the centerpiece of the College's proof against petitioner; and together with the College's other evasions about the nature of its proof, there was no notice given to petitioner reasonably calculated to apprise her of the charges against her so that she would have a constitutionally adequate opportunity to prepare for and meet this proof at the hearing with her own evidence, as required by this Court's decision in *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. at 14-15 and *Mullane v. Central Hanover Trust Co.*, 339 U.S. at 314.

"[W]hen notice is a person's due, process which is a mere gesture is not due process." *Mullane*, 339 U.S. at 315. The College's conduct in this regard was less than a mere gesture; it was a conscious course of evasion in order to place petitioner at a disadvantage

during the hearing. The result was a hearing where petitioner had little, if any, opportunity to rebut in a meaningful way the College's proof, especially the CPA Report. For this reason, there was no full evidentiary hearing and no fully informed decisionmaker who having been apprised of all the facts could have exercised his discretion not to discharge petitioner notwithstanding his authority to do so. Petitioner was thereby denied meaningful notice of the charges against her and a meaningful opportunity to be heard, violating her procedural due process rights.

Substantive Due Process

The fabricated CPA Report was the centerpiece of the College's proof against petitioner. As CPA Dwyer later testified, however, its content was deliberately skewed to favor the College because as its author he was told by the College which witnesses to interview, what evidence to seek and what questions to ask. Moreover, he was told not to interview petitioner or any other witness who may have evidence which favored her. As he averred under oath, this was not an "audit" and it was not a report which met AICPA standards, as the Magistrate erroneously found.

When petitioner discovered that, contrary to what the College had told her, CPA Dwyer had made tape recordings of his witness interviews, he obtained these tapes which revealed testimony and other information which contradicted Dwyer's CPA Report and made clear that it was a fabricated document at odds with the truth which was woven together and engineered solely to justify the College's predetermined decision to discharge petitioner. Yet

this egregiously unfair document supplied the nucleus of proof to support the College's discharge of petitioner before the hearing officer, the Magistrate and the court of appeals..

When the government causes to be made a fraudulent, incomplete and misleading investigative report which is engineered solely to subvert the truth determining process of a subsequent evidentiary hearing and then prevents the subject of that hearing from having fair notice of this report and adducing evidence which rebuts this fraudulent proof, it has deliberately singled out petitioner for its abuse of power and engaged in oppressive governmental action in order to put petitioner "between the rock and the whirlpool." *Garrity v. New Jersey*, 385 U.S. 493, 498 (1967). This is the kind of arbitrary governmental behavior which goes beyond a deprivation of petitioner's procedural due process rights and violates petitioner's substantive due process rights as well.

The concept of substantive due process has not been reduced to any specific formula and "its content cannot be determined by reference to any code." *Poe v. Ullman*, 367 U.S. 497, 542-543(1961)(Harlan, J., dissenting). As the second Justice Harlan observed,

> [T]he full scope of the liberty guaranteed by the Due Process Clause cannot be found in or limited by the precise terms of the specific guarantees elsewhere provided in the Constitution. This "liberty" is not a series of isolated points pricked out in terms of the taking of property; the freedom of speech, press, and religion; the right to keep and bear arms; the freedom from

> unreasonable searches and seizures; and so on. *It is a rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints [by the state]....*

Id. (Emphasis supplied). See *Moore v. East Cleveland*, 431 U. S. 494, 501(1977). The touchstone of substantive due process is an individual's right to be free from the arbitrary action of government, regardless of the fairness of the procedures employed to implement that action. *Collins v. Harker Heights*, 503 U.S. 115, 125(1992). *Daniels v. Williams*, 474 U.S. 327, 331(1986) citing *Dent v. West Virginia*, 129 U.S. 114, 123(1889). It thus serves to prevent governmental power from being "used for purposes of oppression." *Daniels*, 474 U.S. at 331-332(1986) quoting *Murray's Lessee v. Hoboken Land & Improvement Co.*, 18 How. 272, 277 (1856).

In essence, the College's abusive, unfair and coercive conduct toward petitioner by adducing fraudulent, fabricated evidence designed to bolster its own preordained decision to discharge her, using the leverage it possessed as her employer against her, unfairly compromised petitioner in her attempt to mount a viable defense to this rush to judgment and the "show trial" which ensued violated her substantive due process right to be free from oppressive governmental action.

After all, an employee has been denied due process even if she has the benefit of one hundred hearings if the parties to the hearing purposely conspire to supply false evidence which misleads the factfinder. *In re Murchison*, 349 U.S. 133, 136(1955).

Accord, ABF Freight Systems, Inc. v. NLRB, 516 U.S. 317, 323(1994)("False testimony in a formal proceeding is intolerable."); *Napue v. State of Illinois*, 360 U.S. 264, 269(1959); *Mooney v. Holohan*, 294 U.S. 103, 112(1935). *See Soldal v. Cook County*, 506 U.S. 56, 70(1992)("Certain wrongs affect more than a single right and, accordingly, can implicate more than one of the Constitution's demands."). Such is the case here. Despite the feigned authenticity with which the College sought to endow the termination proceedings below, its introduction of the fraudulent, fabricated CPA Report in order to shore up its case for discharging petitioner denied her substantive due process and justifies voiding the decision finding that petitioner should be terminated for cause.

II. The Federal Courts Are Abusing Summary Judgment Procedure By Weighing Evidence and Finding Facts In Order to Dispose of Triable Facts Questions Central To The Respondents' Liability, Denying The Petitioner The Trial Guaranteed Her By the Seventh Amendment On Crucial Fact Issues.

The seventh amendment to the federal constitution provides that in suits at common law, "the right of trial by jury shall be preserved...." As Justice Scalia observed in *Blakely v. Washington*, 542 U.S.296, 305-306(2004), the right to a jury trial in civil cases is no mere procedural formality but rather a fundamental "reservation of power in our constitutional structure," assuring the people's ultimate control of the judiciary. *Id.* citing 2 *The Complete Anti-Federalist* 315, 320(H. Storing ed. 1981). This guaranty of a jury trial in the Constitution and the common law traditions it

entrenches "do not admit the contention that facts are better discovered by judicial inquisition than by adversarial testing before a jury."*Id.* at 313 citing 3 Blackstone, *Commentaries*, at 373-374; 379-381.

Since one of the fundamental duties of the jury in civil cases is to resolve factual disputes bearing on material issues in controversy, the summary judgment procedure now contained in Fed. R. Civ. P. 56 does not violate a party's constitutional right to a jury trial because it is presumed that if the entry of summary judgment is appropriate, there are no genuine issues of material fact for trial and therefore no right to a trial, with or without a jury, is implicated. *Fidelity & Deposit Co. v. United States*, 187 U.S. 315, 320(1902). See also *Pease v. Rathbone-Jones Eng. Co.*, 243 U.S. 273, 278-279(1917).

However, both federal jurists and legal commentators have noted that federal trial judges regularly overuse summary judgment in order to take triable cases away from juries. Hon. W.G. Young, *Vanishing Trials–Vanishing Juries–Vanishing Constitution*, 40 Suffolk U. Law Rev. 67, 78 (2006). Arthur R. Miller, *The Pretrial Rush to Judgment: Are the "Litigation Explosion," "Liability Crisis," and Efficiency Cliches Eroding Our Day In Court And Jury Trial Commitments?*, 78 N.Y.U. Law Rev. 982, 1064; 1066;1071-1072;1133-1134(2003). See Burns, Robert P., *The Death of the American Trial*(2009). As Professor Miller observes, Rule 56's "paper trials" of crucial, disputed fact issues

> would be an unfortunate break with the past. Our civil dispute resolution system has always

> preferred adjudication based on oral testimony in open court subject to cross examination.... [T]hey are considered aspects of what often is referred to as a "day in court," with due process embracing notions of a fair trial before an impartial tribunal.

Id. at 1072 & n. 476, citing *Societe Internationale Pour Participations Industrielles et Commerciales S.A. v. Rogers*, 357 U.S. 197, 209(1958)("There are constitutional limitations upon the power of courts, even in aid of their own valid processes, to dismiss an action without affording a party the opportunity for a hearing on the merits of his case."). See also Thomas, Suja A., *Why Summary Judgment Is Unconstitutional*, 93 Va. L. Rev. 139, 143-144;158-160;177-178(2007).

This overuse of summary judgment has been documented. One scholar concludes that federal courts routinely weigh evidence, draw inferences in favor of the moving party and make credibility determinations. McGinley, Ann C., *Credulous Courts and the Tortured Trilogy: The Improper Use of Summary Judgment in Title VII and ADEA Cases*, 34 B.C. L. Rev. 203, 229(1993). Likewise, it was found that courts often reject the plaintiffs' attempts to create inferences of intent and motive through a totality of circumstantial evidence, thereby creating a triable issue, by treating the evidence in a piecemeal fashion, isolating and rejecting as insufficient each of the discrete elements of the plaintiffs' evidence rather than considering their cumulative effect. *Id.* at 233-236.

Such is the case here. Contrary to the protocol imposed on motion judges by Rule 56, both the

Magistrate and impliedly the court of appeals weighed evidence, made credibility determinations and drew inferences in favor of the College, the moving party, and *against petitioner*, the opposing party, in order to ratify the hearing officer's determination. For example, despite deeply conflicting evidence before the Magistrate, she found as facts that petitioner's abusive behavior had continued through 2004; that petitioner was "antagonistic" to the College's new IT policy; and that the failure by the College to provide petitioner with the affidavits of witnesses as required by the employment contract was irrelevant..

More crucial, on a summary judgment record which clearly questioned the truthfulness and integrity of the CPA Report, bottomed as it was on CPA Dwyer's deposition testimony that its content was deliberately skewed to favor the College, targeting only those witnesses who would support its version of events, the Magistrate found nonetheless that the CPA Report was not only worthy of belief but deserved to be credited as the last word on the propriety of petitioner's discharge. Yet CPA Dwyer further admitted that the CPA Report could not determine whether petitioner had, in fact, violated school policy — and it was not within the report's parameters to do so. Moreover, the Magistrate found that the CPA Report was an "audit" which met the standards of the AICPA, when all the evidence was to the contrary, i.e., CPA Dwyer admitted that he did not perform an audit and that it violated AICPA standards in multiple ways.

The Magistrate could not have made these findings without believing the results of the College's CPA Report to be true and without deciding that the

College's termination process was a fair and transparent one. These were crucial fact questions for a factfinder on this record, not for a judge upon summary judgment. All of these crucial fact questions central to this litigation, i.e., whether petitioner actually committed the charged misconduct, whether respondents' investigation was fair, unbiased and complete and whether it properly concluded that petitioner had violated school policy, deserved to be resolved in petitioner's favor on this summary judgment record, a record which should have been read in favor of petitioner as the non-moving party and against the College as the moving party.

This abuse of Rule 56 procedure justifiably invokes this Court's power of superintendency over the federal courts to reassert their proper role in deciding summary judgment motions, i.e., reaffirming the thrust of *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 150-151(2000) and *Anderson v. Liberty Lobby*, 477 U.S. 242, 249-255(1986) which require them to draw all inferences in favor of the nonmoving party and to refrain from making any credibility determinations in order to resolve material factual disputes because this is a function of the factfinder, not a motion judge.

CONCLUSION

For all of these reasons identified herein, a writ of certiorari should issue to review the judgment of the United States Court of Appeals for the Third Circuit and, ultimately, to vacate and reverse this judgment and remand the matter to the United States District Court for the District of Delaware, with instructions

that petitioner's claims against the respondents for declaratory and injunctive relief as well as for compensatory damages be tried to a jury; or provide the petitioner with such other relief as is fair and just in the circumstances of this case.

Respectfully submitted,

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(any footnotes trail end of each document)

NOTICE: NOT PRECEDENTIAL OPINION UNDER THIRD CIRCUIT INTERNAL OPERATING PROCEDURE RULE 5.7. SUCH OPINIONS ARE NOT REGARDED AS PRECEDENTS WHICH BIND THE COURT.

PLEASE REFER TO FEDERAL RULES OF APPELLATE PROCEDURE RULE 32.1 GOVERNING THE CITATION TO UNPUBLISHED OPINIONS.

No. 07-2758
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT
MARGUERITE A. JOHNSON,
Appellant
v.
ORLANDO J. GEORGE, JR., In both his official and personal capacities; DELAWARE TECHNICAL AND COMMUNITY COLLEGE

October 23, 2008, Submitted Under Third Circuit LAR 34.1(a)

November 14, 2008, Filed

On Appeal from the United States District Court for the District of Delaware. (D.C. Civil No. 05-cv-00157). District Judge: Honorable Mary Pat Thynge.

COUNSEL: For MARGUERITE A. JOHNSON, Plaintiff - Appellant: Gary W. Aber, Esq., Aber, Goldlust, Baker & Over, Wilmington, DE.

For ORLANDO J. GEORGE, Jr., in both his official and personal capacities, DE TECH COMM COLLEGE, Defendants - Appellees: James H. McMackin, III, Esq., David H. Williams, Esq., Morris James, Wilmington, DE.

JUDGES: Before: RENDELL and SMITH, Circuit Judges, and * POLLAK, District Judge.

OPINION OF THE COURT

RENDELL, Circuit Judge.

I. Background[1]

Appellant, Marguerite A. Johnson ("Johnson"), appeals from the District Court's order granting summary judgment in favor of Appellee,[2] the Delaware Technical and Community College ("the College"), pursuant to Fed. R. Civ. P. 56(c). Johnson alleges on appeal that the District Court erred by granting the College's motion for summary judgment because 1) the College provided insufficient notice of the charges against Johnson, including its refusal to provide affidavits from witnesses until the day of the pre-termination hearing; and 2) the District Court relied on an accountant's report that was based upon fabrications, misstatements and subjective conclusions.[3]

This appeal follows an investigation into Johnson's conduct as the Vice President and Campus Director of the Terry Campus of the College and the subsequent pre-termination hearing. An impartial hearing examiner, retired Judge Vincent Bifferato, concluded that Johnson had abused her position by using College

personnel and materials for personal matters and that she had abused the use of her College-issued credit card. Prior to the hearing, Johnson was placed on administrative leave with full pay and benefits. She was notified of the College's intention to terminate her employment, received a report (the "Santora Report") outlining the abuses the investigation uncovered, and was informed of the College's new hearing procedures. n4 Johnson filed a complaint in the District Court against the College alleging that she was denied her procedural due process rights in the events prior to and during the termination hearing. The District Court granted the College's motion for summary judgment on June 12, 2007. For the reasons stated below, we will affirm the order of the District Court.

II. Discussion

The District Court had jurisdiction in this case under 28 U.S.C. §§ 1331 and 1343. We have appellate jurisdiction pursuant to 28 U.S.C. § 1291. We exercise plenary review over the District Court's grant of summary judgment in favor of the College. *Matreale v. New Jersey Dep't of Military & Veterans Affairs*, 487 F.3d 150, 152 (3d Cir. 2007).

A. Procedural Due Process Notice Requirement

The District Court held that the notice Johnson received was sufficient under procedural due process standards. The District Court evaluated the notice that the College afforded Johnson, stating:

> Johnson was aware that her activities were under investigation more than six months prior

> to the hearing. Two and a half months prior to the hearing, Johnson received the Santora Report which outlined the allegations of financial abuse which were the basis for her dismissal. Two weeks before the hearing, the College provided notice of the witnesses it was going to call, and days before, the College offered all of the materials and demonstratives used at the hearing. Therefore, notice was sufficient as it provided the nature of the charges and the evidence against her, and was timely under the circumstances of the case.

Johnson v. George, No. 05-157, 2007 U.S. Dist. LEXIS 42465, 2007 WL 1697276, at *8 (D. Del. June 12, 2007). Johnson argues that the District Court's conclusion denied her due process under her contract with the College because she was not provided with affidavits of witnesses, as stipulated in the contract.

After reviewing the evidence in the record, in the light most favorable to Johnson, we conclude that the District Court properly granted summary judgment to the College because the process she received was more extensive than the process she was due under her employment contract.[5] As the District Court stated:

> Johnson could call and cross-examine witnesses and present evidence. Johnson was represented by counsel, and was able to test the truthfulness of the accusations against her. Johnson testified on her own behalf and proffered 6 witnesses and 47 exhibits.

Johnson, 2007 U.S. Dist. LEXIS 42465, 2007 WL 1697276, at *8. We will not disturb the District Court's holding that the pre-termination procedures satisfied the procedural due process notice requirement articulated in *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 105 S. Ct. 1487, 84 L. Ed. 2d 494 (1985) and *Gniotek v. City of Phila.*, 808 F.2d 241 (3d Cir. 1986), and we [*6] will affirm this aspect of the District Court's order granting summary judgment in favor of the College.

B. Substantive Due Process and Relevance of Accountant's Report

Neither Johnson's complaint nor her amended complaint included a claim for a violation of substantive due process. Johnson argues that the use of false and incomplete evidence at her pre-termination hearing rose to the level of a substantive due process violation. The District Court, in addressing this argument, stated that Johnson had merely "allud[ed] to a possible substantive due process claim" in her opposition to the College's motion for summary judgment and did not specifically raise the claim until she filed her surreply brief. *Johnson*, 2007 U.S. Dist. LEXIS 42465, 2007 WL 1697276, at *8 n.71. The District Court found that Johnson's delay in raising the claim was unreasonable, stating:

> The primary evidence Johnson alleges as false is the Santora Report, a document she possessed for over two and a half months before the pretermination hearing. Johnson cross-examined the investigator and author, David Dwyer, during that hearing. Johnson knew or should

> have known of a substantive due process claim before this action was filed. Johnson's back door amendment to the pleadings is inconsistent with FRCP and the Local Rules of Civil Practice and Procedure of this court.

Id.

However, the District Court nonetheless addressed the merits of Johnson's substantive due process claim, and found that any inaccuracies in the report did not amount to a substantive due process violation, because Johnson had ample opportunity to challenge such inaccuracies by presenting countervailing evidence at the pre-termination hearing. 2007 U.S. Dist. LEXIS 42465, [WL] at *9. Furthermore, the District Court concluded that, considering all the evidence proffered at the pre-termination hearing other than the Santora report, the record supported the hearing examiner's finding that Johnson had converted the College's resources for her personal use. *Id.* We find no error in the District Court's ruling on this issue.

III. Conclusion

For the reasons set forth above, we will AFFIRM the District Court's order granting summary judgment to the College.

Footnotes

*Honorable Louis H. Pollak, Senior Judge of the United States District Court for the Eastern District of Pennsylvania, sitting by designation.

[1]As we write for the benefit of the parties alone, we include only those facts necessary for the disposition of this appeal.

[2]Johnson had also filed a complaint against Orlando J. George, Jr. ("George"), the President of the College. The District Court dismissed Johnson's complaint against George pursuant to the doctrine of qualified immunity. *Johnson v. George*, 2007 U.S. Dist. LEXIS 42465, 2007 WL 1697276, at *10 (D. Del. 2007). Johnson does not appeal from the District Court's order dismissing her complaint against George.

[3]Johnson also claims that the District Court failed to properly apply the summary judgment standard. We find nothing to support this claim.

[4]The new procedures provided: 1) Notice of the reasons for termination; 2) A hearing before an independent, impartial Hearing Officer; 3) The right to confront and cross-examine witnesses testifying under oath; 4) The creation of a stenographic record; 5) The burden of the College to establish one or more reasons for termination by a preponderance of the evidence; 6) The preparation of a written decision by the Hearing Officer; and 7) A binding and final decision by the Hearing Officer.

[5]The employment contract states, "termination shall be for good cause, shall be supported by affidavits of person(s) having knowledge of such cause and by such other evidence as may be deemed sufficient to Employer." (App. 176).

Civil Action No. 05-157-MPT

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF DELAWARE

MARGUERITE A. JOHNSON,
Plaintiff,

v.

ORLANDO J. GEORGE, JR., and DELAWARE TECHNICAL AND COMMUNITY COLLEGE,
Defendants.

June 11, 2007, Decided

COUNSEL: Gary W. Aber, Esquire, Aber, Goldlust, Baker and Over, Wilmington, Delaware, Attorney for Plaintiff.

David H. Williams, Esquire, Morris, James, Hitchens & Williams LLP, Wilmington, Delaware, Attorney for Defendants.

JUDGES: Mary Pat Thynge, U.S. Magistrate Judge.

AMENDED MEMORANDUM OPINION

June 11, 2007

Mary Pat Thynge, U.S. Magistrate Judge

I. INTRODUCTION

This is an employment discrimination case. On March 15, 2005, Marguerite A. Johnson ("Johnson") filed a complaint [1] against Orlando J. George, Jr., ("George") and the Delaware Technical and Community College (the "College" or collectively, "Defendants") alleging violation of her right of free speech under the First Amendment and 42 U.S.C. § 1983. Johnson claims that her comments led to retaliatory action resulting in her wrongful termination. Johnson alleges that she was wrongfully deprived of a property interest by being placed on administrative leave from the College without a grievance procedure, and was denied her procedural due process rights in the events prior to and during a termination hearing.

In support of their motion for summary judgment, Defendants argue that Johnson's statements are not protected under the First Amendment, that paid administrative leave does not deprive her of property rights, and procedural due process was more than adequate. This is the court's determination of that motion.

II. BACKGROUND

Delaware Technical and Community College is a state-wide institution of higher education with campuses in Wilmington, Stanton, Dover (the Terry Campus) and Georgetown. Johnson began her employment 1970 as a GED Instructor and ultimately rose to one of the top leadership positions at the College in 1994. Johnson's success over the years was attributed to her being "a tough cookie who didn't pull punches." [2] Detracting from her successful record were reports of a change in Johnson's behavior. [3] In a November 26, 2002 letter to

Johnson, [4] George expressed concern that her behavior was "all too frequently out of control," and asked that she either take remedial steps to correct her behavior or submit to a thorough investigation of the allegations. Ultimately, Johnson agreed to engage an outside consulting firm for counseling and behavior modification. Allegations of Johnson's abusive, contrary and disrespectful behavior to both colleagues and subordinates continued through 2004. [5]

The complaints surfaced a final time in a report to George of Johnson's antagonistic comments during a departmental meeting. The meeting took place, in part, to introduce a new campus-wide technology policy. Prior to the meeting, and in an effort to consolidate business practices, the President's Council [6] decided to reorganize the Campus Information Technology ("IT") Division. With his Vice-Presidents' advice and agreement, George established the new IT strategy and leadership program, which included a directive to strictly support and follow the new IT director and his agenda. [7] During the November 19, 2004 meeting of the Terry Campus Department Chairs, Johnson's comments "left many with the sense that [she] was unaware of the changes brought about by the reorganization." [8] It was reported to George that Johnson's questions were antagonistic and inconsistent with those of a Campus Director, and expressed a negative attitude toward the new IT policy and disdain for Mr. Shoudy. [9]

George, once again, suggested that an investigation be made into the allegations of improper conduct by Johnson to "get to the bottom and determine whether or not [the] incidents have any substance to them." [10]

He suggested that Johnson either take an administrative leave while the investigation was ongoing, or alternately, accept an early retirement from her position. Johnson replied that neither option was acceptable. [11] On January 3, 2005, George placed Johnson on administrative leave with full pay and benefits, pending an investigation which focused on the allegations about her behavior. In a confidential memorandum, George asked that Johnson gather her personal belongings and leave at the end of that day. The memo stipulated that she neither talk to College employees to discuss the investigation, nor visit College facilities without prior permission. [12] A general announcement was issued stating that Johnson was on administrative leave and that Daniel Simpson would be acting director of the Terry Campus. Johnson subsequently filed a grievance with Human Resources, which was denied on the basis that paid administrative leave is contractually a non-disciplinary and non-grievable action, [13] because Johnson was not adversely affected by the leave. [14] On March 15, 2005, Johnson filed the present matter.

An investigation was undertaken by the College's attorney, David Williams, Esq., and an accountant from the Santora Baffone CPA Group. The investigation uncovered that Johnson abused her position at the Terry Campus by using personnel and materials for personal reasons, misused a College issued credit card, and was abusive toward employees. The CPA Group produced a report (the "Santora Report") outlining the abuses and sent it to Johnson on April 15, 2005. As a result of the investigation, George determined that a pre-termination hearing was in order. On April 26, 2005, upon the recommendation of counsel, the

College's Board of Trustees adopted new rules of procedure for conducting termination proceedings to protect Johnson's due process rights, [15] which afforded rights that were not included in the College's Personnel Policy Manual. [16] Specifically, the new rules provided:

1. Notice of the reasons for termination.

2. A hearing before an independent, impartial Hearing Officer.

3. The right to confront and cross-examine witnesses testifying under oath.

4. The creation of a stenographic record.

5. The burden of the College to establish one or more reasons for termination by a preponderance of the evidence.

6. The preparation of a written decision by the Hearing Officer.

7. A binding and final decision by the Hearing Officer. [17]

On the following day, Johnson was sent notification of the College's intention to terminate her employment which included the grounds for termination and the new hearing procedures.

On May 11, 2005, retired Delaware Superior Court Judge Vincent Bifferato was appointed as the hearing officer in the matter. [18] On June 17, 2005, the College identified its witnesses and on June 28, 2005, Johnson received the College's hearing exhibits, and affidavits

from witnesses. On the following day in a two-day hearing, the College presented 13 witnesses and 30 exhibits. Through counsel, Johnson cross-examined the College's witnesses. Johnson testified on her own behalf and presented 6 witnesses and 47 exhibits. Judge Bifferato reviewed the eight page report from the Santora Baffone Group to determine if Johnson's actions were consistent with College policy. The audit conducted by Santora Baffone was in accordance with standards established by the American Institute of Certified Public Accountants. [19] On July 19, 2005, after reviewing the evidence presented at the hearing, including the exhibits, Judge Bifferato issued a decision that Johnson be terminated for cause. He found that the College met its burden of proof by a preponderance of the evidence that "Johnson inappropriately used College personnel and materials for personal matters" and that "Johnson did not fully and equitably replay [sic] the College for such labor and materials." [20] In addition, he commented that Johnson followed a "pattern of abuse in the use of [her] College [issued] credit card." [21] Finally, he concluded that Johnson's actions clearly met the requirements for termination outlined in her employment contract. [22] Consistent with the findings of Judge Bifferato, Johnson's employment was terminated on July 19, 2005.

III. LEGAL STANDARD

Summary Judgment

A grant of summary judgment pursuant to Fed. R. Civ. P. 56(c) is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is

no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." [23] A Rule 56(c) movant bears the burden of establishing the lack of a genuinely disputed material fact by demonstrating "that there is an absence of evidence to support the nonmoving party's case." [24] "Where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no genuine issue for trial." [25] To avoid summary judgment, a plaintiff must offer "concrete evidence from which a reasonable [trier of fact] could return a verdict in his favor" and may not rely on unsupported assertions or conclusory allegations. [26] Even so, the nonmovant must be given the benefit of all justifiable inferences and the court must resolve any disputed issue of fact in favor of the nonmovant. [27]

First Amendment Protection

The United States Supreme Court's decision in Garcetti v. Ceballos [28] addresses whether a public employee's speech is protected under the First Amendment. In prior opinions, the Court "identified two inquires to guide interpretation of the constitutional protections accorded to public employee speech." [29] The first requires determining if the employee was speaking "as a citizen on a matter of public concern." [30] If not, there is no motivation for retaliatory action and therefore, no cause of action. [31] The second question is whether the employer had adequate justification to restrict the speech, relating the content of the speech to the employer's interest in promoting efficiency for the public service it performs. [32] Ultimately, the burden of showing that the speech is protected rests with the employee. [33] In Garcetti, the Court maintains the

delicate balance of interests between when an employee speaks as a citizen addressing a matter of public concern, and when an employee is "simply performing [her] job duties, [where] there is no warrant for a similar degree of scrutiny." [34] It reasons that public employees occupy trusted positions in society, and therefore, when they speak out against government policy, the speech can impair the proper performance of government functions. [35] It found that "the First Amendment does not prohibit managerial discipline based on an employee's expressions made pursuant to official responsibilities." [36] While the dissent in Garcetti argued that the need for balance does not disappear "when an employee speaks on matters his job requires him to address," [37] an employee "should not prevail on balance unless he speaks on a matter of unusual importance and satisfies high standards of responsibility in the way he does it." [38] Eligible subject matter for comment would include: "official dishonesty, deliberately unconstitutional action, other serious wrongdoing, or threats to health and safety." [39]

Procedural Due Process

A government employee may be deprived of a property interest if not afforded due process in termination proceedings. The State cannot deny an expectation of continued employment without due process of law. [40] The Fourteenth Amendment does not, itself, create property rights, but rather, protects rights granted employees. [41] Property rights are determined from sources independent of the Constitution, such as, a state law or employee contract. [42] Prior to termination, a government employee is generally entitled to "notice of the charges against him, an explanation of the

employer's evidence, and an opportunity to present his side of the story." [43] Notice is sufficient if "1) it apprises the vulnerable party of the nature of the charges and general evidence against him, and 2) if it is timely under the particular circumstances of the case." [44] A simple statement providing notice of the charges and nature of the evidence is enough. [45] The specificity required should provide the "opportunity to determine what facts, if any, within [the plaintiff's] knowledge might be presented in mitigation of or in denial of the charges." [46] While advance notice is not required, "the timing and content of notice . . . will depend on appropriate accommodation of the competing interests involved." [47]

IV. POSITIONS OF THE PARTIES AND ANALYSIS

The College defends its conduct by arguing that Johnson's statements were made pursuant to her official duties, and she was not speaking as a citizen on a matter of concern for First Amendment purposes. It maintains that Johnson was not denied due process in the investigation and subsequent termination hearing and was not subject to adverse action as a result of having to choose between early retirement and paid administrative leave. Johnson disagrees. She contends that she was denied due process throughout her administrative leave and in her pre-termination hearing.

Johnson's Speech as Government Employee

The College explains that Johnson was a high ranking official with a leadership position during the Terry Campus meeting for Department Chairs. It

asserts that Johnson's speech projected a lack of support for the new IT director and his policies, an area within her authority as Director of the Terry Campus. It states that personnel matters and department reorganizations are areas of concern for a campus Director, and not the general citizenry.

Johnson argues it was not her job to manage, direct or control the IT department, and therefore, her comments were outside of her job responsibilities. She argues that as a Vice President, she was not required to attend every meeting on campus, nor supervise the IT department. She adds that she was not a regular attendee of Department Chair meetings and therefore, attendance was not part of her daily professional activities as Director. Johnson contends that she acted appropriately in discussing public concerns for the IT system at the meeting and was not subversive or insubordinate. In the alternative, she argues that if her comments are characterized as subversive and insubordinate, the characterization supports that she must have "acted outside of her job duties in raising those issues." [48]

In Garcetti, the Court concludes that when government employees speak in an official capacity and are "simply performing their job duties," [49] they have no First Amendment right, and the court need not balance that right and an employer's prerogative to restrict it. Johnson rationalizes the Garcetti opinion as "narrow," of "limited scope" and "inapplicable," explaining that a government employee's speech is always protected from discipline, except, when acting within the defined limits of her job description or as part of her specific, daily professional activities. Johnson's characterization

is unpersuasive. Garcetti explains that the "First Amendment protects a public employee's right, in certain circumstances, to speak as a citizen addressing matters of public concern." [50] Johnson was acting in her capacity as the Campus Director, with overall responsibility for the needs of the students and faculty of the campus when attending and participating in the Department Chair meetings, the purpose of such included review of the College IT program, as well, as other campus related matters. Johnson argues that because she did not regularly attend these meetings, that they do not fall within her employment responsibilities. Johnson's logic of how attending a faculty meeting could be described as outside of her official capacity is unpersuasive. There is no indication that the public was invited to attend or participate in such meetings and there is no evidence that the meeting in question addressed matters unrelated to College issues. Following Johnson's argument to its logical conclusion means that all College matters are public issues. That argument eviscerates the principles of Garcetti because Johnson would always be addressing public concerns just by her position as a government employee.

Johnson contends that since she was not responsible for managing the IT department, her attendance was not required, nor within her employment duties. [51] Her argument is nonsensical, and contradicts Johnson's own admission of concern over the new IT strategy and its impact on campus services. In Garcetti, "[r]estricting speech that owes its existence to a public employee's professional responsibilities does not infringe any liberties the employee might have enjoyed as a private citizen. It simply reflects the exercise of employer

control over what the employer itself has commissioned or created." [52] Johnson was responsible for the Terry Campus, and her attendance at the Chairpersons meeting is consistent with that role. Therefore, the College did not infringe Johnson's liberties by subjecting her to any resultant discipline for her conduct.

Johnson's Speech as a Matter of Public Concern

The College maintains that Johnson's statements do not address any misuse of College funds or allegations of wrong-doing, and therefore were not a matter of public concern. It contends that Johnson's statements regarded personnel and operational matters or "personnel squabbles," are not matters of public interest and do not meet the definition of speech protected by the First Amendment. It submits that a dispute over departmental reorganization is, in essence, a power struggle between departments. Assuming such speech is protected, it argues that Johnson's speech was not a basis of Judge Bifferato's decision and not a motivating factor in the decision to terminate her employment.

Johnson argues that the subject matter of the meeting was one of public concern. She states that the IT department affected how the administrators, students and the outside public would interact with the school, and therefore automatically is a matter of public concern. Johnson admits that she had previous issues with the IT department and that her statements were relevant to how that department offered service to the Terry Campus. [53] Finally, in an affidavit dated July 17, 2006, Johnson suggests that the College offered off-campus interactive computerized classes through the

IT department and as a result, her comments dealt with issues related to the public. [54]

Criticism of the College's IT strategy and leadership is not the type of speech protected by the First Amendment according to Garcetti and its progeny. The structure and function of the IT department are issues for the College faculty, staff and students, but such communications are not matters of public concern. Garcetti explains that "[o]fficial communications have official consequences, creating a need for substantive consistency and clarity" and a supervisor's communications must be "accurate, demonstrate sound judgment, and promote the employer's mission." [55] Johnson's comments at the Directors meeting did not "promote the employer's mission" because they questioned an agreed upon policy set forth by the College. If Johnson's superiors thought her comments were "inflammatory or misguided, they had the authority to take proper corrective action." [56] In his role as president of the College and Johnson's superior, George generated consensus regarding the new IT strategy, hired a program manager, and specifically called for the Vice Presidents to support the new policies. Johnson's comments were critical of the program, failed to promote the College's mission, and were subject to corrective measures. Even if the court balances Johnson's right to express her opinions with the College's needs, her comments are not protected speech. Her criticisms did not address nor were directed to "official dishonesty, deliberately unconstitutional action, other serious wrongdoing, or threats to health and safety." [57] Simply, Johnson's statements expressed her disapproval for George's choice of an IT director and his programs. Speech

directed to internal personnel and operational matters is not protected by the First Amendment.

In conclusion, Johnson acted in her role as director of the Terry Campus by her attendance and participation in the meeting of faculty chairpersons. She spoke on certain issues as director of the Campus. Her comments projected her dissatisfaction with the College's choice in leadership and the IT strategy. Her speech did not target matters of public concern. Therefore, no genuine issue of material fact exists. Johnson's comments during the Campus Chairperson's meeting do not fall within any First Amendment protection.

Procedural Due Process

The College contends that the hearing procedures afforded Johnson exceeded the minimal due process required by the Due Process Clause of the 14th Amendment and under her employment contract. First, it explains that since Johnson was suspended with pay, she was not being disciplined, nor was she denied a property or liberty interest and therefore, no process was mandated before placing her on leave. It also states that she received advance notice of the charges against her in the Santora Report. [58] Witnesses were identified by the College on June 17, 2005, eleven days before the hearing. Johnson was provided with over one thousand pages of documents, in addition to the exhibits the College planned to rely on at the hearing. The College maintains that the process was both fair and adequate because Judge Bifferato was appointed as the hearing officer, and the College Trustees agreed to be bound by his decision.

Johnson proposes that she has a constitutionally protected property interest in her employment and that the unfair nature of the proceedings denied her due process. [59] She contends that the College denied her due process rights by placing her on administrative leave without the right to a grievance procedure, and that the College's actions stigmatized her and damaged her professional reputation. She argues that her paid administrative leave was a disciplinary action, and a grievance procedure was guaranteed by her employment contract. Johnson complains that she was also denied the right to speak to College employees while the investigation was underway, and therefore, the investigation was generally unfair to her. She contends that the investigation and the Santora Report was "riddled with errors, omissions and contradictory facts" implying that the College manipulated the decision making process, resulting in a decision that was "intrinsically flawed." [60] Johnson alleges that she was unable to refute the testimony against her because the College refused to "provide specifics concerning such testimony." [61] She also reasons that changes made by Defendants to the pre-termination hearing process did not eliminate the College's prior contractual obligation to provide her with affidavits from witnesses. Finally, she claims her procedural due process rights were violated because she did not receive a description of the evidence to be used to prove her abuse of employees.

Johnson's contention, that she was deprived of a property interest as a result of the College's termination procedure, is unsubstantiated. The court recognizes that Johnson has a property interest in her continued employment and turns to the issue of what

process Johnson is due. The United States Supreme Court in Cleveland Bd. of Educ. v. Loudermill, states that "[t]he tenured public employee is entitled to oral or written notice of the charges against him, an explanation of the employer's evidence, and an opportunity to present his side of the story." [62] While the hearing "need not be elaborate," it must provide the "determination of whether there are reasonable grounds to believe that the charges against the employee are true and support the proposed action." [63] The adequacy of the hearing is dependant on the importance of the property interest being denied and the property right to one's livelihood is extremely important. [64] If post-termination proceedings are non-existent, then a more elaborate pre-termination hearing is required. [65] Although "advance notice is not a per se requirement of due process," [66] Johnson received ample notice of the charges and had a reasonable opportunity to prepare a response. Johnson was aware that her activities were under investigation more than six months prior to the hearing. Two and a half months prior to the hearing, Johnson received the Santora Report which outlined the allegations of financial abuse which were the basis for her dismissal. Two weeks before the hearing, the College provided notice of the witnesses it was going to call, and days before, the College offered all of the materials and demonstratives used at the hearing. Therefore, notice was sufficient as it provided the nature of the charges and the evidence against her, and was timely under the circumstances of the case.

Prior to April 2005, the College did not have guidelines for conducting a pre-termination hearing for a Campus Vice-President. The College's Board of Trustees

approved the new guidelines to insure that both parties would be represented fairly and due process procedures were followed. During the two day hearing, Johnson was provided an opportunity to respond to the charges against her. The Constitution requires a proceeding to be "appropriate under the circumstances; [but] it does not require confrontation and cross examination in every proceeding." [67] The purpose of such a proceeding is to determine "whether there are reasonable grounds to believe that the charges against the employee are true and support the proposed action." [68] At the pre-termination hearing Johnson could call and cross-examine witnesses and present evidence. Johnson was represented by counsel, and she was able to test the truthfulness of the accusations against her. Johnson testified on her own behalf and proffered 6 witnesses and 47 exhibits. Retired Superior Court Judge Bifferato, whose decision in the matter was final, reviewed all of the material presented. He found that there were reasonable grounds to believe that the charges against Johnson were true and supported her dismissal. In his report, the Judge determined that the College met its burden of proof by a preponderance of the evidence that "Johnson inappropriately used College personnel and materials for personal matters" and portrayed a "pattern of abuse in the use of [her] College [issued] credit card." [69] He concluded that Johnson's actions clearly met the requirements for termination outlined in her employment contract. [70] In conclusion, the hearing procedures afforded Johnson the due process provided by her employment contract and under the 14th Amendment.

Substantive Due Process

Johnson claims that her substantive process rights were denied because the termination hearing did not "meet the basic requirements of speaking the truth." [71] She primarily focuses on the Santora Report, claiming that because it is "riddled with errors" and "not designed to seek the truth, " Judge Bifferato's decision is intrinsically flawed and unfair. [72] Johnson links her substantive due process argument to a violation of procedural due process by claiming that she was stigmatized by negative newspaper articles about the investigation and dismissal. [73] Johnson also suggests that Judge Bifferato may have been biased because of an alleged conflict of interest. [74]

To support a violation of substantive due process, government action must be so "ill conceived or malicious that it shocks the conscience" [75] or "arbitrary or irrational," [76] exceeding negligence and indifference to "reach a level of gross negligence." [77] "The exact degree of wrongfulness necessary to reach the 'conscience-shocking' level depends upon the circumstances of a particular case." [78] In a substantive due process matter, a properly supported motion for summary judgment will require the nonmovant to produce some (more than a "scintilla") evidence in support of his position. [79]

The College's decision to terminate Johnson's employment cannot be described as malicious, arbitrary or irrational. Johnson was placed on paid administrative leave. She was not arbitrarily dismissed for her alleged behavior. Johnson was provided with a pre-termination hearing. The evidence proffered at the hearing supports Judge Bifferato's findings. Johnson argues that the Santora Report was false because it

focuses on her abuses of College policy and not her merit-worthy behavior. [80] She claims that the procedure set forth by the College, limited the review, and therefore, rendered the analysis inaccurate. The investigation was to determine whether Johnson had violated College policy. The Santora Report determined that she had by converting College resources for her personal use. Johnson had over two months to prepare to rebut the charges and to counter the report. She had the opportunity to present facts and evidence at the hearing to address the alleged inaccuracies. An independent hearing officer determined the charges were founded.

Finally, Johnson's argument that a denial of procedural due process directly results in a violation of substantive due process is a misinterpretation of case law. [81] Substantive due process violations must be supported with facts that Defendants acted "arbitrarily or irrationally" in a way that would "shock the conscience" of the court. Implying that Johnson might have been stigmatized by the College's actions does not meet this burden. Nothing Johnson has presented rises to the level of a substantive due process claim.

As a result, Johnson fails to state a viable substantive due process claim.

Qualified Immunity

Defendants assert that the doctrine of qualified immunity requires dismissal of the case against George since his conduct in performing his discretionary duties did not violate Johnson's statutory or Constitutional rights. Defendants contend that George is protected

from civil liability, as long as, he did not knowingly violate Johnson's Constitutional rights. They note that "Johnson has not sufficiently alleged a violation of even colorable constitutional or statutory rights, much less 'clearly established' ones." [82]

Johnson concludes that if her "First Amendment rights were violated, it follows that those rights were clearly established [and] the defendant does not have qualified immunity." [83] Johnson contends that George would have reasonably known, because he had the advice of his attorneys, that denying her a grievance procedure and subjecting her to administrative leave would be a violation of the First Amendment.

Generally, government officials are protected from civil liability when their conduct "does not violate clearly established statutory or Constitutional rights of which a reasonable person would have known." [84] "The question is whether a reasonable public official would know that his or her specific conduct violated clearly established rights." [85] The issue of qualified immunity requires a "careful examination of the record (preferably by the district court) to establish, for purposes of summary judgment, a detailed factual description of the actions of each individual defendant (viewed in a light most favorable to the plaintiff)." [86] When public officials, however, "invoke administrative processes for a legitimate purpose, they are acting in conformity with the Constitution and cannot be violating 'clearly established' law (because they are not violating the law at all)." [87]

Based upon a careful review of the facts, Defendants have established that George's conduct did not violate

Johnson's clearly established rights. First, George acted to preserve Johnson's due process rights during the investigation and pre-termination hearing. George admitted that "it was counsel's advice to me as president that in order to protect Dr. Johnson's due process rights, that I should ask the Board of Trustees to adopt these rules of procedure." [88] Instead of clearly violating Johnson's rights, George sought and applied counsel's recommendations to preserve Johnson's property interest and due process rights. George provided Johnson with notice of the charges against her and an opportunity to be heard. He supported the College Board's approval of the revised hearing process that focused on providing Johnson with a fair and impartial hearing. George authorized the appointment of an independent hearing officer, whose recommendation would be final. Finally, George had a legitimate purpose in placing Johnson on administrative leave and proceeding with a the pre-termination hearing. Johnson was forewarned that her behavior would lead to an investigation of allegations of abuse. George ordered the investigation which required the temporary removal of Johnson from her position. The resultant report and findings of abuse directed the termination proceeding. These actions were not improper, nor infringe clearly established rights. As a result, the doctrine of qualified immunity applies to George.

V. CONCLUSION

For the reasons stated above, the College's motion for summary judgment is GRANTED. An appropriate order consistent with this memorandum will follow.

ORDER

At Wilmington this 11th day of June, 2007.

IT IS ORDERED that the Memorandum Opinion dated May 15, 2007 be corrected to substitute "42 U.S.C. § 1983" for the incorrect cite "43 U.S.C. § 1493" in the first sentence of the decision.

IT IS ALSO ORDERED that footnote number 26 be corrected to substitute citation "*Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256 (1986)." for the incorrect cite "Anderson v. Liberty Lobby, Inc., 477 U.S. 343, 356 (1986) ."

/s/ Mary Pat Thynge

UNITED STATES MAGISTRATE JUDGE

1 D.I. 1.

2 D.I. 115 at 5.

3 D.I. 108 at 3 (George first started hearing complaints about Johnson's behavior in 2002).

4 D.I. 109 at 128 (That letter also states that George was "deeply concerned because the unacceptable behavior described is strikingly similar to many anecdotal reports I have received concerning your behavior").

5 D.I. 108 at 6.

6 The President's Counsel constituents were George and the six Vice-Presidents (including Johnson). During the latter half of 2005, George was the President of the College and Johnson was a Vice-President and Director of the Terry Campus.

7 D.I. 108 at 4 (Mr. Peter Shoudy, the school's Chief Technology Officer).

8 D.I. 109 at 33.

9 Id.

10 D.I. 108 at 6.

11 D.I. 116 at 49.

12 Id. at 50.

13 D.I. 119 at 3.

14 D.I. 109 at 87.

18 Bifferato was recommended by Hope Murray, head of Human Relations, and selected by George.

19 D.I. 109 at 46 (The report was reviewed by the State of Delaware Office of Auditor of Accounts. In the report, dated November 10, 2005, the Auditor concurred with the findings of the CPA Group and referred the case to the Office of Attorney General for the State of Delaware for review and any further action). D.I. 109 at 212.

20 D.I. 116 at 109.

21 Id. at 110.

22 Id. at 111.

23 *Lujan v. National Wildlife Federation*, 497 U.S. 871, 884, 110 S. Ct. 3177, 111 L. Ed. 2d 695 (1990).

24 *Celotex Corp. v. Catrett*, 477 U.S. 317, 325, 106 S. Ct.

25 48, 91 L. Ed. 2d 265 (1986).25 *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986).

26 *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986).

27 *Eastman Kodak Co. v. Image Technical Servs., Inc.*, 504 U.S. 451, 456, 112 S. Ct. 2072, 119 L. Ed. 2d 265 (1992).

28 *Garcetti v. Ceballos*, 547 U.S. 410, 126 S. Ct. 1951, 164 L. Ed. 2d 689 (2006).

29 *Id.* at 1958 (citing *Pickering v. Bd. of Educ.*, 391 U.S. 563, 88 S. Ct. 1731, 20 L. Ed. 2d 811 (1968)).

30 *Id.*

31 See *Mt. Healy City School Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 287, 97 S. Ct. 568, 50 L. Ed. 2d 471 (1977).

32 See *Garcetti*, 126 S. Ct. at 1957.

33 See *Watters v. City of Philadelphia*, 55 F.3d 886, 892 (3d Cir. 1995).

34 Garcetti, 126 S. Ct. at 1961.

35 See *Id.* at 1958.

36 *Id.* at 1954.

37 *Id.* at 1961.

38 Id. at 1967.

39 *Id.*

40 See *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 538, 105 S. Ct. 1487, 84 L. Ed. 2d 494 (1985).

41 *Id.*

42 *See Board of Regents v. Roth*, 408 U.S. 564, 577, 92 S. Ct. 2701, 33 L. Ed. 2d 548 (1972).

43 *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 546, 105 S. Ct. 1487, 84 L. Ed. 2d 494 (1985).

44 *Gniotek v. City of Philadelphia*, 808 F.2d 241, 244 (3d Cir. 1986).

45 *See Id.*

46 *Id.*

47 *Goss v. Lopez*, 419 U.S. 565, 579, 95 S. Ct. 729, 42 L. Ed. 2d 725 (1975).

48 D.I. 115 at 35.

49 *Garcetti v. Ceballos*, 547 U.S. 410, 126 S. Ct. 1951, 1961, 164 L. Ed. 2d 689 (2006).

50 Id. at 1957 (emphasis added)

51 D.I. 115 at 34.

52 *Garcetti*, 126 S. Ct. at 1960.

53 D.I. 115 at 8.

54 D.I. 116 at 334.

55 *Garcetti*, 126 S. Ct. at 1960.

56 Id.

57 Id.

58 The Santora Report included a detailed explanation of the allegations of improper conduct and misuse of College funds.

59 D.I. 115 at 41.

60 D.I. 115 at 42.

61 Id. at 44.

62 470 U.S. 532, 538, 105 S. Ct. 1487, 84 L. Ed. 2d 494 (1985).

63 *Id.* at 545.

64 See *Hameli v. Nazario*, 1994 U.S. Dist. LEXIS 20523, 1994 WL 827787, *4 (D. Del. Sept. 2, 1994).

65 *Id.*

66 Morton v. Beyer, 822 F.2d 364, 369 (3d Cir. 1987).

67 *Hameli v. Nazario*, 1994 U.S. Dist. LEXIS 20523, 1994 WL 827787, *6 (D. Del. Sept. 2, 1994).

68 *Doherty v. Delaware*, 424 F. Supp. 2d 729, 734 (D. Del. 2006).

69 D.I. 116 at 213.

70 Id. at 214.

71 Johnson argues, essentially for the first time in a lengthy surreply brief of thirty-four pages that the evidence at the pre-termination hearing was false and incomplete.' In her fifty page answering brief (in excess of the page limitation authorized under the court's local rules), she alludes to a possible substantive due process claim. No where in her original or amended complaints is a substantive due process claim raised. Further, those complaints are absent of any allegations of fraud, which under the Federal Rules of Civil Procedure ("FRCP"), specifically Rule 9, are to be pled with specificity. Therefore, no notice of a substantive due process claim was provided. Johnson points to no discovery directed to such a claim.

The primary evidence Johnson alleges as false is the Santora Report, a document she possessed for over two and a half months before the pre-termination hearing.

Johnson cross-examined the investigator and author, David Dwyer, during that hearing.

Johnson knew or should have known of a substantive due process claim before this action was filed. Johnson's back door amendment to the pleadings is inconsistent with FRCP and the Local Rules of Civil Practice and Procedure of this court.

72 D.I. 115 at 42.

73 Id. at 48.

74 The firm with whom Judge Bifferato is associated as senior counsel represented the College in four matters which arose in the 1994-1996 time frame, nine to eleven years before the Johnson pre-termination hearing and four to six years before Judge Bifferato retired from the bench in April 2000. See www.courts.delaware.gov. The only reported matter ended in 1999, six years before the pre-termination hearing. Obviously, Judge Bifferato was not involved with the firm before his retirement. Moreover, a member of the firm served as a mediator in 2004 in a case in which the College was one of four of parties, which suggests that the firm was not representing and had not recently represented the College. Clearly, Judge Bifferato never represented any party in the present matter. Johnson never states that Judge Bifferato was biased: rather, she suggests that the selection process was partial.

75 Miller v. Philadelphia, 174 F.3d 368, 374 (3d Cir. 1999).

76 Duffy v. Bucks, 7 F. Supp. 2d 569, 576 (E.D. PA

1999).

77 Miller, 174 F.3d at 376.

78 Id.

79 See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 252, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986).

80 D.I. 115 at 14.

81 Johnson's answer brief states: "In addition, the Court had found that in addition to the termination (on procedural due process) was without basis and fact. Accordingly, a violation of the substantive due process has also been established." *Morris v. Bd. of Edu. Of Laurel Sch. Dist.*, 401 F. Supp. 188, 211 (D. Del. 1975). The facts in *Morris* are clearly distinguishable. There, the court held that the defendant breached the plaintiff's contract and violated her 14th Amendment rights because it denied her the opportunity to be heard and failed to advise her of the charges (which the court determined were unfounded). As a result, the plaintiff's procedural and substantive due process rights were determined to be violated.

82 D.I. 108 at 27 (citing *Kodrea v. City of Kokomo, Indiana*, 458 F. Supp. 2d 857, 2006 WL 1750071, at *12 (S.D. Ind. 2006)).

83 D.I. 115 at 48.

84 *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S. Ct. 2727, 73 L. Ed. 2d 396 (1982).85 *Grant v. City of Pittsburgh*, 98 F.3d 116, 121 (3d Cir. 1996) (emphasis in

original)(citing *Anderson v. Creighton*, 483 U.S. 635, 107 S. Ct. 3034, 97 L. Ed. 2d 523 (1987)).

86 Id. at 122.

87 Id. at 125.

88 D.I. 109 at 31

Filed 1/26/2009
No. 07-2758
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT
MARGUERITE A. JOHNSON,
Appellant
v.
ORLANDO J. GEORGE, JR., In both his official and personal capacities; DELAWARE TECHNICAL AND COMMUNITY COLLEGE

On Appeal from the United States District Court for the District of Delaware. (D.C. Civil No. 05-cv-00157). District Judge: Honorable Mary Pat Thynge.

Present: SCIRICA, Chief Judge, SLOVITER, McKEE, RENDELL, BARRY, AMBRO, FUENTES, SMITH, FISHER, CHAGARES, and HARDIMAN, Circuit Judges, and POLLAK,* District Judge,

SUR PETITION FOR REHEARING WITH SUGGESTION FOR REHEARING IN BANC

The petition for rehearing filed by Appellant having been submitted to all judges who participated in the decision of this court, and to all the other available circuit judges in active service, and a majority of the judges who concurred in the decision not having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in bane, the Petition for Rehearing is hereby DENIED.

BY THE COURT:
/s/ Marjorie O. Rendell

Circuit Judge

Footnotes

*Honorable Louis H. Pollak, Senior Judge of the United States District Court for the Eastern District of Pennsylvania, sitting by designation.

April 12, 2005

Gerard M. McNesby
Vice President for Finance
Delaware Technical and Community College
Office of the President
P.O. Box 897
Dover, DE 19903

Dear Mr. McNesby:

We have performed the procedures enumerated below, which were agreed to by Delaware Technical and Community College (DTCC), solely to assist you with determining the adherence to established policies for certain transactions and events entered into or performed by Marguerite M. Johnson, Ed.D. (Dr. Johnson), in her capacity as Vice President/Campus Director of the Terry Campus. This agreed-upon procedures engagement was conducted in accordance with attestation standards established by the American Institute of Certified Public Accountants. The sufficiency of these procedures is solely the responsibility of those parties specified in the report. Consequently, we make no representation, regarding the-sufficiency of the procedures described below either for the purpose for which this report has been requested or for any other purpose.

Our procedures and findings are as follows:

Procedures Applied

We interviewed Kathy Powell, Administrative Assistant to Dr. Johnson, regarding her performance of

non-DTCC activities. performed during normal DTCC business hours at the direction of Dr. Johnson from July 1, 1999 to December 31, 2004.

Policy

Based on the DTCC Personnel Policy Manual, Section 6.01, the Vice President and Campus Director in charge of the campus is authorized to establish, working periods and to designate work assignments in the best interests of DTCC. In addition, Section 1.1.11 of the Policy Manual states that the first duty and responsibility of the full-time employee is to render to DTCC the most effective service possible. No outside service or enterprise, professional or other, should be undertaken that might interfere with this discharge of this primary responsibility.

Findings

From the interview, it was determined' that Ms. Powell officially reported to Dr. Johnson since July 1, 1999 and has performed considerable non-DTCC activities for Dr. Johnson on a routine basis during this time. Ms. Powell spent a substantial amount of time working on the following items for Dr. Johnson during regular business hours and. using DTCC assets (i.e. computer equipment and- supplies):

•The McConnell-McClurkin Family Reunion nonprofit corporation was incorporated in 2001. This was a corporation formed by Dr. Johnson to receive donations to help fund the costs of hosting a personal reunion. Ms. Powell typed the bylaws, board agendas, board minutes, executive committee meeting minutes, other

correspondence, and also set up mail merge distribution lists, mailing labels, and reconciled the checkbook.

• Reconciling Dr. Johnson's personal checkbook every month.

•Doing Dr. Johnson's personal on-line banking, and upon direction, transferring money to her personal savings account.

•Handling numerous correspondences to close personal credit card accounts for Dr. Johnson.

•Handling numerous correspondences for Dr. Johnson's disabled sister's care, including sending monthly invoices to her sister's insurance company seeking reimbursement.

•Filling out Dr. Johnson's son's Free Application for Student Financial Aid (FAS-FA) form on-line.

•Handling numerous correspondences for Dr. Johnson's son, including letters regarding his lease, the Department of Elections for Kent County, and Salisbury State University. Handling invitations to Dr. Johnson's son's graduation and being the RSVP contact.

•Handling numerous correspondences for Dr. Johnson's daughter, including letters to hei sorority; canceling a book club membership; to the post office to correct her address; to the Wyndam Hotel for her daughter's wedding; and graduation invitations.

•Handling miscellaneous letters on behalf of Dr.

Johnson's husband to the Department of Public Safety for running a red light and to New All Saints Catholic Church to complain about a family members funeral and signing the family members' names at the end of the letter.

•Handling 21 family Thanksgiving place cards.

•Running numerous personal errands for Dr. Johnson on demand during business hours.

•Handling a personal family reunion in 1999 as outlined in more detail below.

Ms. Powell's estimate of the amount of time she time spent working on non-DTCC activities during business hours for Dr. Johnson was 10%. In order to, quantify the amount of Ms. Powell's diverted personnel costs from July 1, 1999 to December 31, 2004, we multiplied her annual salary and benefit costs for each respective year-by 10%.. This equated to $23,422.

Policy

Based on the DTCC Personnel Policy Manual, Section 6.01, the Vice President and Campus Director in charge of the campus is authorized to establish working periods and to designate work assignments in the best interests of DTCC. In addition, Section 11.11 of the Policy Manual states that the first duty and responsibility of the full-time employee is to render to DTCC the most effective service possible. No outside service or enterprise, professional or other, should be undertaken that might interfere with this discharge of this primary responsibility.

Findings

Each employee interviewed had some involvement in Dr. Johnson's 1999 family reunion. Their involvement in the 1999 reunion included typing correspondence, typing recipes, designing and creating marketing pieces, scanning and touching up photographs, and copying and assembling the completed project. The completed project included a cookbook; genealogy book, program, save the date cards, candy bar wrappers, reminder cards, and bookmarks. The 2001 reunion involved two employees who scanned photographs into an insert for a program. Since the reunion happened almost six years ago, it was difficult to obtain a definitive answer from people regarding the amount of time spent on the 1999 family reunion. In order to quantify the amount of diverted personnel costs, we used time estimates from interviews to arrive at a high/low range of hours worked multiplied by the employees' hourly rate of pay for that time period. In order to quantify the material costs associated with producing all of the reunion documents, we used paper usage estimates from the interviews and by our examination of certain documents. The cookbook had 66 pages, the genealogy book had between 35 and 45 pages, and the program had between 10 and 20 pages. We estimated one page forthe other reunion pieces listed above. Based on our interviews and examination of the reunion database file, we estimated 150 to 200 copies were made for each piece. We have compiled the table below as a means of summarizing the dollar amount of diverted personnel costs and material costs incurred by DTCC. See the accompanying schedules for further details of estimates.

High

Reunion	Personnel Costs	Material Costs	Reunion Total
1999	$5,724	$4,340	$10,064
2001	261	-	261
	$5,985	$4,340	$10,325

Low

Reunion	Personnel Costs	Material Costs	Reunion Total
1999	$3,204	$2,771	$5,975
2001	122	-	122
	$3,326	$2,771	$6,097

In addition to her personal family reunions, Dr. Johnson used DTCC personnel to perform the following other non-DTCC. related services:

•Vacation pictures: Dr. Johnson asked the Marketing Department to download her 2003 vacation pictures from an Internet site and print them for her. Based on the results of our interviews, there were 40 to 50 pictures that took hours to print on the color copier. Once Dr. Johnson reviewed all the pictures, she requested duplicates of certain pictures, again tying up the color copier for hours.

•Banners: Dr. Johnson requested two banners be made in the Marketing Department. They were congratulation banners for her daughter's graduation in 1998.

•Graduation invitations: Dr. Johnson requested her son's graduation invitations be made in the Marketing Department.

Conclusion

In the above procedures and findings, we set out to determine if there were any deviations from existing policies in place, and if determinable, the cause of the deviation from such policies. Based on our 12 interviews of DTCC personnel, Dr. Johnson created an atmosphere of intimidation and fear. When the personnel were asked if they knew, it is was wrong to perform non-DTCC related business for the benefit of Dr. Johnson, the consistent answer was "yes, but you did what you were told to do." These people feared reprisal in the form of a bad evaluation or even being "sent to the parking lot," which was Dr. Johnson's saying for job termination. Dr. Johnson was known to call people incompetent and threaten people with being replaced by someone better qualified. These people feared Dr. Johnson, and in order to keep their employment at DTCC, they did what Dr. Johnson told them, without objection.

Procedures Applied

We reviewed the following specific transactions as identified by DTCC to determine their appropriateness and adherence to established policies:

1)	Three Castle Antiques	October 4, 2002
2)	Three Castle Antiques	October 6, 20002
3)	Bag & Baggage, Inc.	August 10, 2002
4)	Terry Campus Bookstore	October 31, 2002
5)	Friends of the Capital Theater	September 12, 2002
6)	Friends of the Capital Theater	September 17, 2002

7) Friends of the Capital Theater — June 25, 2003

Policy

The existing DTCC fiscal policy relating to the use of the PNC Bank Supercard credit card states the individual cardholder agrees to use the card for approved purchases and agrees not to charge personal purchases. Each cardholder is responsible for maintaining an activity log of all card purchases with supporting documentation. All Supercard transactions are subject to prior written approval. Any misuse of the Supercard will be grounds for discipline up to and including termination of employment. All employees who are issued a Supercard are required to review and sign off documenting their understanding of the policy.

Findings

•Items purchased in transaction 1 included two pieces of jewelry, purchased by Dr. Johnson for $80, that are in violation of the allowable costs in accordance with Supercard Employee Disclosure Statement and Guidelines, which Dr. Johnson signed upon issuance of her Supercard. Based on inquiries with Business Office personnel, Dr. Johnson did not provide supporting documentation that substantiated this transaction and these items could not be located on the Terry Campus.

•Transaction 2 included the purchase by Dr. Johnson of three children's storybooks from an antique store in West Virginia totaling $371. Based on inquiries with Business Office personnel, Dr. Johnson did not provide supporting documentation that substantiated this transaction and these items could not be located on the

Terry Campus.

•Transaction 3 included the purchase by Dr. Johnson of a $435 attache case, and based on our inquiries with certain campus personnel, this item could not be located on the Terry Campus.

•Transaction 4 was for the Purchase by Dr. Johnson of a $39 silver bracelet and could not be located on the Terry Campus. This transaction was charged to a state appropriation code and the supporting invoice did not indicate the business purpose of the purchase. No personal reimbursement from Dr. Johnson could be located.

•Transactions 5 and 6, which were entered into by Dr. Johnson, totaled $1,100. Transaction 5 was for $800 to purchase a table for the Camelot Fund Raising Gala held at the Schwartz Center for the Arts. Transaction 6 is for two season tickets for the fall/winter 2002 season at the Schwartz Center. Both transactions violate the allowable cost provisions of the Supercard Employee Disclosure Statement and guidelines. Based on inquiries with Business Office personnel, Dr. Johnson did not provide supporting documentation that substantiated these transactions.

•Transaction 7 in the amount of. $450 for the purchase of two season tickets to the Schwartz Center for the Arts, was initiated by and included on Kathy Powell's Supercard and subsequently approved by Dr. Johnson, is in violation of the allowable cost provisions associated with Supercard purchases.

Procedures Applied

We reviewed the following business trip of Dr. Johnson to determine its appropriateness and adherence to established laws and policies:

Wake Technical Community College (WTCC) Raleigh, NC October 23-26, 2002

Policy

The existing DTCC fiscal policy relating to the use of the PNC Bank Supercard credit card states that the individual cardholder agrees to use the card for approved travel and agrees not to charge personal purchases. Each cardholder is responsible for maintaining an activity log .of all card purchases with supporting documentation. All Supercard transactions are subject to prior written approval. Any misuse of the Supercard will be grounds for discipline up to and including termination of employment. All employees who. are issued a. Supercard are required to review and sign off documenting their understanding of the policy.

DTTC Terry Campus Travel Policy and Section 11.10 of the DTCC Personnel Policy Manual states that a travel request must be completed by the employee and approved by the employee's supervisor prior to departure and authorization for travel is the responsibility of the President. Upon return from the trip, the travel reconciliation form should be completed by the employee and submitted to the Accouhting Office within 10 days. If personal travel expenses are billed at the same time as business-related travel expenses, the employee will reimburse DTCC for the personal portion within 10 working days of the

employee's return.

Findings

Examination of Dr. Johnson's WTCC travel request form indicated there was no approval by her supervisor, Dr. Orlando George, DTCC College President, prior to her departure. Dr. Johnson submitted a "DTCC - Terry Campus TRAVEL REQUEST FORM," dated October 21, 2002, to the Business Office with a stated destination of Raleigh, North Carolina, departing on October 23, 2002 and returning October 26, 2002. The October 21, 2002 dating of the travel request form preceded Dr. Johnson's signature date of November 11, 2002. The travel request form stated the following Explanation of Travel Request "To tour and meet with administrators for Institutional Advancement/Development and Public Safety/Security from Wake Technical Community College in Raleigh, NC."

Based upon this data, SantoraBaffone CPA Group (SBG) contacted the individuals at WTCC responsible for Public Safety/Security and Institutional Advancement/Development - Carol E. Himes, Facilities' Engineer Officer; and Jane A. Rabon, Executive Director of WTCC Foundation. Mrs. Himes could not remember the exact date of Dr. Johnson's visit, but stated "that late October 2002, seemed about right. Mrs. Himes stated that she received a call from Dr. Johnson asking if she could meet with Mrs. Himes to discuss Public Safety/Security at WTCC, while she [Dr. Johnson] was in town visiting family. The fact that the call took place is validated by reference to Dr. Johnson's Verizon Wireless bill, billing date November

19, 2002, that shows a call being placed by Dr. Johnson, utilizing her cell phone, on October 24, 2002 at 3:11 p.m. to Mrs. Himes' telephone number. Per my discussions with Mrs. Himes, this is the only time that Dr. Johnson.spoke with her prior to their.meeting to discuss WTCC Public Safety/Security.

Mrs. Himes remembered meeting with Dr. Johnson, subsequent to the phone call, for approximately one to two hours.Where they discussed general college public safety and security issues.

Mrs Rabon stated that she could not remember meeting with anyone from DTCC during her tenure as Executive Director of WTCC Foundation.

The total cost of the three-day WTCC trip charged on the Supercard was $1,198, and included round. trip airfare ($166), three-day hotel stay ($646), three-day car rental ($334), and three days of parking at BWI ($52). The total personnel cost of the three-day WTCC trip for Dr. Johnson was $1,653, and includes her daily salary ($451) plus benefits costs ($99).

Conclusion

According to DTCC Fiscal Guidelines, the Vice President/Campus Director shall share overall responsibility with the Office of the President for insuring that fiscal operations are accomplished in conformance with appropriate laws, regulations, and policies, and shall take steps necessary to bring about compliance. Based on the procedures applied to the Supercard purchases and travel expenditures, Dr. Johnson deviated from the established DTCC Fiscal

Guidelines as follows:

•By not providing supporting documentation for expenditures incurred,

•By purchasing personal items with state funds and not providing personal reimbursement,

• By not safeguarding DTCC assets purchased with state funds,

•By not obtaining prior approval for business trips, and

•By not providing the documentation that. substantiated the business purpose for the expenditures incurred.

In all cases, we attempted to verify whether Dr. Johnson reimbursed DTCC for the personal use of DTCC assets. Based upon our inquiries, we were able to locate. one receipt from Dr. Johnson in the amount of $365.40. This.receipt was dated August 16, 1999, and the description for the transaction was "Reimb fr Dr. Johnson." We were not able to locate supporting documentation for the transaction.

Summary

Based on interviews with WTCC staff and external personnel, review of supporting documentation, and review of existing policies and procedures, there are specific instances where Dr. Johnson deviated from state and DTCC policies, charged DTCC for unauthorized/ nonbusiness-related travel, and misused DTCC personnel and the assets entrusted to her. We recommend that DTCC inform the appropriate state

agency as a means of initiating a more indepth investigation into these matters.

We were not engaged to, and did not, conduct an audit, the objective of which would be the expression of an opinion on the specified elements, accounts, or items. Had we performed additional procedures, other matters might have come to our attention that would have been reported to you.

This report is intended solely for the information and use of the management of DTCC, the Attorney General's Office, and the Office of the Auditor of Accounts and is not intended to be and should not be used by anyone other than these specified parties.

CPA Group

July 19, 2005

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Re: Marguerite Johnson

Counsel:

On January 3, 2005, Dr. Marguerite A. Johnson, Vice President and Director of the Dover campus of Delaware Technical & Community College was placed on administrative leave pending an investigation involving her pattern of behavior over the past several years. On April 27, 2005, Marguerite Johnson through her attorney, Gary Aber, was given notice of intent to terminate her employment based upon a study conducted by Santora Baffone CPA Group dated April 12, 2005, which constituted a course of conduct which was a hazard to the health, safety and well-being of the College, its employees and students. On May 11, 2005, I was appointed as hearing officer in this matter. The hearings were held on June 29, and July 1, 2005 at the campus of Delaware State University. After reviewing

all of the evidence presented at the hearing including exhibits, I find the pertinent facts to be as follows.

Dr. Marguerite A. Johnson was hired as a full-time employee of Delaware Technical & Community College in 1974. Through various appointments, she eventually became a Vice President and Director of the Dover campus of the Delaware Technical & Community College. Dr. Johnson's conduct in running the Dover campus came into question the latter part of 2004. After a meeting with the President of the College, Dr. Johnson was placed on paid administrative leave in January, 2005. An investigation was then undertaken by David Williams, Esquire, an attorney for the Delaware Technical & Community College, and an accountant employed by Santora Baffone CPA Group. As a result of these investigations, it was determined that Dr. Johnson abused her position at the Dover campus by using personnel and material for personal purposes, abuse of a college credit card, and abusive behavior towards employees.

Some time in 1999, Dr. Johnson was planning a family reunion. She was in charge of this particular event and used staff at the Dover campus for purposes of preparing a cookbook, genealogy book, programs, invitations, and flyers. According to the CPA report, thousands of dollars of personnel time and material of the College was spent on this purpose. Although Dr. Johnson claims she paid monies back to the College, it is apparent that she did not fully reimburse the College for the personnel time and materials.

It was also demonstrated that Dr. Johnson, being in possession of a college credit card, used the credit card

on many trips not only for school purposes but for personal purposes, most of which she repaid the College once so informed. However, she did purchase several items, a briefcase, several antique books and jewelry for personal use, where there was no reimbursement.

It is also a contention of the College that Dr. Johnson was inappropriately abusive to many of its employees. After reviewing all of the evidence and the exhibits, the hearing officer finds that the College has met its burden of proof by a preponderance of the evidence that Dr. Johnson inappropriately used College personnel and materials for personal matters. It has also been established by a preponderance of the evidence that Dr. Johnson did not fully and equitably replay the College for such labor and materials. Dr. Johnson defends these allegations by claiming that many employees in a position of authority also have staff do personal errands and favors for their bosses. However, the magnitude of this undertaking for the 1999 reunion was a gross deviation from any accepted practice for the secretary at times performing a minor personal errand for their supervisor. It is clear that Dr. Johnson was in a position of authority. She should have known that use of College personnel for private matters was inappropriate and set a bad example for all of those who worked on the project. Although it is clear that Dr. Johnson did not tell any of the employees to keep the matter private, it is also clear that Dr. Johnson took advantage of these employees and their knowledge of her treatment of other employees that this was a personal matter. Dr. Johnson inappropriately used her position as Vice President and Director of the Dover campus to have the employees do her personal work at great expense to the College. It is also evident that her manner in

dealing with other employees suggested to these employees that the matter be kept private.

Dr. Johnson also had a pattern of abuse in the use of the College credit card. In February, 2002, a super card issued by PNC Bank was given to Dr. Johnson for use in travel and other necessities as her responsibilities dictated. However, the use of this card was strictly limited to College expenses. Dr. Johnson on many occasions used this credit card for personal items. Dr. Johnson through her attorney has offered into evidence many checks written to the School that clearly indicates that she used the credit card and reimbursed the School. This was in direct violation of the guidelines set forth in the use of this credit card. The evidence also shows by a preponderance that she used this credit card on many occasions and had to be reminded to repay the School instead of initiating repayment on her own. The evidence also shows that on at least three occasions the use of this credit card was for items that were personal in nature and not repaid to the School.

Dr. Johnson was well aware that her treatment of employees by abusive conversation thwarted any attempts of suggestions that employees under her would advise her or inform her that certain monies were owed by her to the College for unapproved use of this credit card.

The pattern and behavior of Dr. Johnson in the two items above clearly indicate that these activities constituted a hazard to the health, safety and well being of the College and its employees. Dr. Johnson's use of employees and materials amounted to thousands of dollars.

Dr. Johnson's actions as explained above clearly meet the requirements in Paragraph 3(d) of her employment contract signed by the College and Dr. Johnson on July 25, 1974. In the judgment of the employer, any act that constitutes a reasonable hazard to the health, safety and well being of employer's agents, servants, employees or students is ground for termination for cause. The College has met that burden. It is the decision of the hearing officer that Dr. Johnson be terminated for cause.

Very truly yours,

Vincent A. Bifferato

No. 08-1370

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OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE
Supreme Court of the United States

MARQUERITE A. JOHNSON,

Petitioner,

v.

ORLANDO J. GEORGE, JR., *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENTS ORLANDO J. GEORGE, JR. AND DELAWARE TECHNICAL AND COMMUNITY COLLEGE

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QUESTIONS PRESENTED

I. Whether Petitioner's failure to present the Seventh Amendment claim to the courts below precludes consideration of the claim by this Court?

II. Whether this Court should review a substantive due process claim which was asserted for the first time in Petitioner's surreply brief in summary judgment briefing.

III. Whether summary judgment on a substantive due process claim is appropriate where an administrative decision to dismiss an employee is supported by substantial evidence, and the employee presents nothing which suggests the employer acted arbitrarily or irrationally in a way that would shock the conscience of the Court?

IV. Whether an employee who received more process than she was due under the Due Process Clause, and her employment agreement, has a viable procedural due process claim.

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STATEMENT OF THE CASE

Petitioner Marguerite A. Johnson ("Petitioner" and referred to as "Johnson" by the Courts below) asserted that statements she made as a public employee during the course of her official duties were protected by the First Amendment. Petitioner also claimed her placement on paid leave pending an investigation of her behavior, and her subsequent termination, following detailed notice of the charges, and a two-day hearing before an impartial hearing officer, violated her procedural due process rights and her liberty interest under the Due Process Clause of the 14th Amendment. Petitioners surreply brief in the summary judgment briefings advanced, for the first time, a substantive due process claim.[1]

---

1. Petitioner's claim changed throughout the course of this litigation. The case began as a First Amendment retaliation claim with procedural due process and liberty interest claims, including claims the College denied her access to witnesses, coerced witnesses, denied her pre-hearing discovery, stigmatized her, and deprived her of a liberty interest when it placed her on paid administrative leave. It then evolved into a case where she claims the College should have provided her affidavits "in advance" and relied upon "false evidence." Petitioner's free speech claim is no longer being prosecuted, she no longer contests George's qualified immunity, she presents no argument in support of her liberty interest claim, and she apparently drops her claim that the hearing officer was somehow conflicted from impartially deciding whether the College demonstrated cause to terminate.

On appeal to the Third Circuit, Petitioner abandoned her First Amendment claim. In exercising plenary review over the District Court's grant of summary judgment, the Third Circuit rejected Petition's procedural due process claim. The Third Circuit held that Petitioner received all the process she was due under the Due Process Clause, and more process than she was due under her employment contract. The Third Circuit noted with approval the District Court's determination that Petitioner's delay in raising the substantive due process claim until she filed her surreply brief in summary judgment was unreasonable. More importantly, the Third Circuit affirmed the holding that any inaccuracies in an investigative report did not rise to the level of a substantive due process violation because Petitioner had every opportunity to challenge any inaccuracies at the termination hearing, and the evidence presented at the hearing supported the hearing officer's finding that Johnson converted her employer's resources to her personal use. On appeal to this Court, Petitioner asserts for the first time a claim that the grant of summary judgment violated Petitioner's rights under the 7th Amendment of the federal constitution.

There is no split among the circuits pertinent to the resolution of this case. Moreover, the Third Circuit's ruling was correct, and the petition should be denied.

COUNTER STATEMENT OF THE GOVERNING FACTS

The "Statement" section of the petition omits critical facts, and mischaracterizes both facts in the record, and the holdings below.

Petitioner attempts to divert attention from the reason for her termination (financial improprieties) by beginning with a summary of accolades she received during her career. This summary is irrelevant to the findings of misconduct, and ignores the District Court's recognition of evidence that: "Johnson's success over the years was attributed to her being 'a tough cookie who didn't pull punches.' Detracting from her successful record were reports of a change in Johnson's behavior." As early as 2002, George expressed concern her behavior was "all too frequently out of control." *Johnson v. George* (*Johnson I*), C.A. No. 05-157-MPT, 2007 WL 1697276, at *1 (D. Del. June 12, 2007). Petitioner also ignores the District Court's recognition of evidence that in 2002 George asked that Petitioner to either take remedial steps to correct her behavior, or submit to a thorough investigation of the allegations. (*Id.*) The District Court also found that: "Ultimately, Johnson agreed to engage an outside consulting firm for counseling and behavior modification. Allegations of Johnson's abusive, contrary and disrespectful behavior to both colleagues and subordinates continued through 2004." (*Id.*)

Petitioner's statement that, during the course of a meeting on November 19, 2004, she asked questions that touched on matters of public concern (Pet. 7) relates to

the First Amendment claim she jettisoned on appeal to the Third Circuit. In all events, the District Court held that such statements are not speech on a matter of public concern protected by the First Amendment relying on this Court's decision in *Garcetti v. Cabellos*, 547 U.S. 410 (2006). *Johnson I*, 2007 WL 1697276, at *6.

Petitioner inaccurately states that in December 2004 George notified Petitioner that she demonstrated an unwillingness to support the College's IT network reorganization, was insubordinate, and failed to follow school policy. (Pet. 7) George's December 8, 2004 letter advises Petitioner of reports he received concerning the November 19, 2004 meeting, and points out that, if the reports George received are accurate, Petitioner asked questions raising doubt about her support for the IT Reorganization, and led some to believe Petitioner was unaware of the changes brought about by the Reorganization (A77-A78.)[2] In light of the earlier reports George received concerning Petitioner's inappropriate and unprofessional behavior, George requested a conference with Petitioner to discuss such behavior. (*Id.*)

Petitioner states she was given a choice of resigning, or her colleagues and staff would be interrogated. (Pet. 7) There was no threat of interrogation. George offered Petitioner the option of retiring, or the College would conduct an independent investigation of the behavior allegations. George told Petitioner he did not know whether the allegations were true, but he had to

2. Citations to "A__" are to documents found in the Appendix filed with the Third Circuit Court of Appeals on September 25, 2007.

get to the bottom of whether the allegations concerning the November 19, 2004 meeting, as well as the incidents in 2002 and thereafter, were true. (A1240.) Petitioner declined to retire. George decided to ". . . retain outside counsel, an independent, arm's length, well-respected law firm, who would come in and do the independent investigation formally, and determine whether or not the allegations were true." (A559.) Such an investigation was never completed because information concerning financial improprieties surfaced after Petitioner was placed on paid leave. (A126-A127; A488; A128-A129; A1250-A1251.)

Petitioner claims that, during the period of time when she was prohibited from speaking with present and former employees of the College (which might compromise the investigation), an investigation was conducted with the goal of terminating Petitioner for cause. (Pet. 9.) There is no evidence to support this claim.

There is no support in the record for the portions of the Petition characterizing the College's investigation as a "sham" focused on "handpicked witnesses" in order to reach a "foregone conclusion." While Petitioner states Simpson suggested only names of people who would support allegations of misconduct against Petitioner, (Pet. 9), Simpson testified he provided names of people related to the activities in question. (A1478.) By the same token, Petitioner's statements that witnesses were interrogated, she was denied access to witnesses, and witnesses were compelled to testify, (Pet. 8) are not supported by the record. Rather, witnesses testified that they did not feel any pressure testifying. (A1112.)

Moreover, witnesses testified that, at the time Petitioner was placed on paid leave, the Dean of Instructions said that they may be called upon to answer questions, and that they should be truthful without any fear of being concerned about any repercussions. (A1110.) Finally, no one is aware of anyone who testified for or against Petitioner at the termination hearing whose career has been affected. Petitioner also ignores the testimony of the Dean of Instruction that the interviews conducted started with the following introduction: "Whatever you say there's not going to be any retribution. We just want to find out, ask you some questions, get your input on occurrences at the Terry Campus and please answer them honestly and however you recall." (A1496.)

The contention no one contacted Petitioner for her version of the facts during the investigation (Pet. 9-10) disregards the fact that Petitioner was represented by counsel, and counsel for the College requested that Petitioner's attorney provide any relevant information. Petitioner's counsel did not respond to this request. (A553-A554.)

Petitioner incorrectly states the hearing officer relied upon the CPA Report prepared by SantoraBaffone CPA Group (the "CPA Report"). Petitioner repeatedly refers to the CPA Report as the "centerpiece" or "nucleus" of the evidence against her. She claims the termination decision "bottomed" on the CPA Report and was the "last word" on the propriety of her discharge. (Pet. 32.) While this assault on the CPA Report is inaccurate in several respects, the fatal flaw in Petitioner's argument is that Petitioner was not terminated based upon the CPA Report. Petitioner was terminated based on the evidence

presented at the two-day termination hearing. A review of the 550-page transcript of the termination hearing reveals the College presented 13 witnesses and 30 exhibits. Petitioner presented 7 witnesses and 47 exhibits. Indeed, her counsel objected to the CPA Report as hearsay. The CPA Report served the limited purpose of providing Petitioner detailed notice of the charges.[3] (A130-131.) The Hearing Officer's decision makes it clear his determination is based upon ". . . reviewing all of the evidence presented at the hearing including exhibits." (A154.)

In addition to the fact that the evidence presented at the termination hearing is the only material consideration, Petitioner's discussion of the CPA Report (Pet. 13-14) misstates several key facts. For example, Dwyer, the author of the CPA Report, was not limited to interviewing the list of individuals the College believes may have knowledge of Petitioner's financial improprieties. Rather, Dwyer testified that each person Dwyer interviewed suggested another person who should be interviewed, and that he did so. (A1156.) Moreover, stating that ". . . there is no attempt to find the truth of the allegations, except as within the limits of the directed agreed upon procedures," is misleading. A fair reading of the testimony upon which Petitioner relies in making this statement is that Dwyer's objective was to find the facts concerning the issues he was investigating, as opposed to looking at issues outside the scope of his investigation. (A1168.) Moreover, he never testified the report was "deliberately skewed to favor the College." (Pet. 26.)

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3. The College did not present evidence on all of the charges set forth in the CPA Report.

ARGUMENT

Petitioner appeals to this Court because the Petitioner contends the College terminated her based upon fabricated evidence, and disputed facts were construed at summary judgment in favor of the moving party. The petition should be denied not only because she makes these arguments with complete disregard to the standard of review, the undisputed facts, and prevailing law, but also because this case involves none of the factors which make a case worthy of granting certiorari.

I. PETITIONER'S FAILURE TO PRESENT THE SEVENTH AMENDMENT CLAIM TO THE COURTS BELOW MUST RESULT IN THE DENIAL OF CERTIORARI.

Petitioner alleges that summary judgment is being undermined, which affects her Seventh Amendment right to a jury trial. This claim was not presented to the courts below. Thus, neither the District Court, nor the Third Circuit addressed this contention. This Court will not review a claim which the Petitioner failed to assert in the courts below. *Travelers Cas. and Sur. Co. of America v. Pacific Gas and Elec. Co.*, 549 U.S. 443, 444-445 (2007) (citing *Cooper Industries, Inc. v. Aviall Services, Inc.*, 543 U.S. 157, 168-169 (2004)) ("The Court ordinarily does not consider arguments . . . that were neither raised nor addressed below, . . ."); *see also Clingman v. Beaver*, 544 U.S. 581, 598 (2005) (*citing Cooper Industries, Inc. v. Aviall Services, Inc.*, 543 U.S. 157, 168-169 (2004); *Taylor v. Freeland & Kronz*, 503 U.S. 638, 645-646 (1992)) ("We ordinarily do not consider claims neither raised nor decided below, . . .").

II. CERTIORARI SHOULD BE DENIED BECAUSE THE SUBSTANTIVE DUE PROCESS CLAIM WAS NOT ALLEGED IN THE COMPLAINT.

Petitioner argues the termination decision is based upon "false evidence" (Pet. 17-29) in violation of the right to substantive and procedural due process. Putting to the side the fact that Petitioner ignores the limited standard of review applicable to a substantive due process claim (Argument IV), as the District Court and the Third Circuit noted: "Neither Johnson's complaint nor her amended Complaint included a claim for a violation of substantive due process." *Johnson v. George* (*Johnson II*), 299 Fed. Appx. 139, 142 (3d Cir. 2008). Indeed, Petitioner did not specifically raise the substantive due process claim until she filed her surreply brief in the summary judgment briefing. (*Id.*) Her failure to plead substantive due process is fatal to her claim. *See Conley v. Gibson*, 355 U.S. 41, 47 (1957) (stating a complaint must give the defendant "fair notice of what the plaintiff's claim is") *abrogated on other grounds by*, *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007); *see also* Fed. R. Civ. P. 8(a) ("A pleading that states a claim for relief must contain . . . (2) a short and plain statement of the claim . . . and (3) a demand for the relief sought . . ."). The District Court points out that:

> Johnson argues, essentially for the first time in a lengthy surreply brief of thirty-four pages that the evidence at the pre-termination hearing was false and incomplete. In her fifty page answering brief (in excess of the page limitation authorized under the court's local rules), she alludes to a possible substantive

> due process claim. No where in her original or amended complaints is a substantive due process claim raised. Further, those complaints are absent of any allegations of fraud, which under the Federal Rules of Civil Procedure (" FRCP"), specifically Rule 9, are to be pled with specificity. Therefore, no notice of a substantive due process claim was provided. Johnson points to no discovery directed to such a claim.
>
> The primary evidence Johnson alleges as false is the [CPA] Report, a document she possessed for over two and a half months before the pre-termination hearing. Johnson cross-examined the investigator and author, David Dwyer, during that hearing.
>
> Johnson knew or should have known of a substantive due process claim before this action was filed. Johnson's back door amendment to the pleadings is inconsistent with FRCP and the Local Rules of Civil Practice and Procedure of this court.

Johnson I, 2007 WL 1697276, at n. 71; see *Johnson II*, 299 Fed Appx. at 142 ("Neither Johnson's complaint nor her amended complaint included a claim for a violation of substantive due process."). Petitioner's backdoor amendment to the pleadings precludes granting certiorari.

III. CERTIORARI SHOULD BE DENIED WHEN AN APPEAL CONCERNS ONLY THE RIGHTS OF THE PETITIONER, THERE IS NO CONFLICT AMONG THE CIRCUITS, INVOLVES NON-PRECEDENTIAL OPINIONS BELOW, AND MERELY QUARRELS WITH FACTUAL FINDINGS AND THE APPLICATION OF EXISTING LAW.

This case does not meet the rigorous standards applied by this Court in determining whether to grant certiorari. A decision by this Court will not resolve a conflict between circuits. Moreover, this is not a case with broad implications to other public employees. To the contrary, this case is fact specific with respect to: the notice Petitioner received prior to her hearing; her rights under her employment contract; whether substantial evidence supported the decision to terminate; and whether the decision to terminate is supported by substantial evidence, and is not irrational or arbitrary. The determination of these issues will have no impact upon a class or group of individuals.

In addition, the cases below were not reported cases. Therefore, the cases below will not have an effect on other litigants.

Finally, Rule 10 provides that: "A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." The petition falls squarely within the limitation set forth in Rule 10.

IV. THERE IS NO VIOLATION OF SUBSTANTIVE DUE PROCESS WHERE THE ADMINISTRATIVE FINDINGS ARE SUPPORTED BY SUBSTANTIAL EVIDENCE, AND ARE NEITHER ARBITRARY NOR IRRATIONAL.

The Petitioner's attempt to use the substantive due process claim as the avenue for securing a trial de novo of the termination decision suffers from a fatal flaw. Petitioner ignores the limited standard of review. The District Court summarized the Petitioner's burden as follows:

> To support a violation of substantive due process, government action must be so "ill conceived or malicious that it shocks the conscience" or "arbitrary or irrational," exceeding negligence and indifference to "reach a level of gross negligence." "The exact degree of wrongfulness necessary to reach the 'conscience-shocking' level depends upon the circumstances of a particular case." In a substantive due process matter, a properly supported motion for summary judgment will require the nonmovant to produce some (more than a "scintilla") evidence in support of his position.

Johnson I, 2007 WL 1697276, at *9 (citing *Miller v. Philadelphia*, 174 F.3d 368, 374, 376 (3d Cir. 1999); *Duffy v. Bucks*, 7 F. Supp.2d 569, 576 (E.D. PA 1999); and *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986)). Applying this standard of review, the District Court concluded the decision to terminate ". . . cannot

be described as malicious, arbitrary or irrational," and the evidence presented at the hearing supports the hearing officer's findings. *Id.*

The District Court points out that Petitioner's claim that the investigative report includes "false evidence" disregards Petitioner's opportunity to present and confront witnesses at a pre-termination hearing. Moreover, the hearing took place after Petitioner was provided notice of the charges over two months prior to the hearing, over one thousand pages of documents, a list of the College's witnesses 11 days in advance of the hearing, and the exhibits the College planned to rely on at the hearing. The District Court concluded that "Nothing Johnson has presented rises to the level of a substantive due process claim." *Id.*

Petitioner suggests that the evidence used to terminate was fabricated. She had a hearing at which an impartial hearing officer, a retired judge who served on the Delaware Superior Court for 32 years, heard evidence over the course of two days. She presented testimony and evidence to test the evidence the College introduced against her. The hearing officer concluded that the College met its burden of establishing cause to terminate. The courts below confirmed that substantial evidence supported the hearing officer's decision.

What Petitioner attempted to do in the courts below, and attempts to do now, is use a substantive due process claim to secure *de novo* review of an administrative decision. Such attempts are consistently rejected. *Klinge v. Lutheran Charities Ass'n of St. Louis*, , 523 F.2d, 56, 60 (8th Cir. 1975). ("While plaintiff was entitled

to judicial review of the administrative action that was finally taken against him, he was not entitled to a trial *de novo* as to his competency to remain on the staff at Lutheran. The judicial inquiry available to him was limited to a consideration of whether his ultimate removal from the staff involved deprivations of procedural or substantive rights guaranteed by the fourteenth amendment."); *Blunt v. Marion County Sch. Bd.*, 515 F.2d 951, 956 (5th Cir. 1975) ("Our judicial review of Mrs. Blunt's claim that in her dismissal by the Marion County School Board she was denied substantive due process is circumscribed. For sound policy reasons, courts are loathe to intrude upon the internal affairs of local school authorities in such matters as teacher competency."); *Simard v. Bd. of Educ. of Town of Groton*, 473 F.2d 988, 995 (2d Cir. 1973) ("The district judge was not required to make a *de novo* determination of the truth of the charges against Simard"); *Logan v. Warren County Bd. of Educ.*, 549 F. Supp. 145, 150 (S.D. Ga. 1982.) ("In reviewing the decision not to renew plaintiff's contract, the Court is limited to a two step level of inquiry: 1) whether the procedures followed by the school authorities comported with due process requirements, and, if so, 2) whether the action taken is supported by substantial evidence"); *Viverette v. Lurleen B. Wallace State Jr. Coll.*, 587 F.2d 191, 193 (5th Cir. 1979) ("Because federal courts are limited in the scope of their review to the procedures employed by and the evidence before an educational review board, it was not improper for the district court to grant summary judgment on the basis of the transcript of the hearing by the [administrative tribunal] and the exhibits attached thereto; in fact, *de novo* hearings in district courts on such matters are not favored.").

Providing dismissed employees a *de novo* hearing in federal court will undermine the purpose of administrative dismissal hearings and overburden the federal courts with dismissal hearings for terminated employees for the following reasons.

> The federal court is not the appropriate forum in which to review the multitude of personnel decisions that are made daily by public agencies. We must accept the harsh fact that numerous individual mistakes are inevitable in the day-to-day administration of our affairs. The United States Constitution cannot feasibly be construed to require federal judicial review for every such error. . . . The Due Process Clause of the Fourteenth Amendment is not a guarantee against incorrect or ill-advised personnel decisions.

Bishop v. Wood, 426 U.S. 341, 359-60, 96 S.Ct. 2074, 48 L.Ed.2d 684 (1976).

In short, Petitioner's substantive due process argument does not secure a *de novo* hearing if, as is the case here, substantial evidence supports the termination decision, and the government action is not so ill conceived or malicious that it shocks the conscience, or arbitrary or irrational. In addition, Petitioner overstates the significance of the CPA Report, which she claims is "riddled with errors and omissions." She would like the Court to believe the "flawed" CPA Report

was the only evidence offered to establish her misconduct. To the contrary, as the District Court points out, the hearing officer's findings were based on the evidence presented by a total of 20 witnesses and 77 exhibits at the two day hearing. *Johnson I*, 2007 WL 1697276, at *8. The limited purpose of offering the CPA Report was to demonstrate that Petitioner had notice of the charges against her. Indeed, the CPA Report was incorporated by reference into the notice of intent to terminate so that Petitioner knew, well in advance, the allegations against her. "Two and a half months prior to the hearing, Petitioner received the CPA Report which outlined the allegations of financial abuse which were the basis for her dismissal." *Id.* Similarly, the Third Circuit observed that: "Furthermore, the District Court concluded that, considering all the evidence proferred at the pre-termination hearing other than the Santoro Report, the record supported the hearing examiner's finding that Johnson had converted the College's resources for her personal use. We find no error in the District's ruling on this issue." *Johnson II*. 299 Fed. Appx. at 142.

Petitioner claims the District Court wrongly found that the CPA Report was an audit prepared in accordance with AICPA standards. The issue of whether the CPA Report was an audit and complied with AICPA standards was not presented to the District Court. In an effort to make it appear that the District Court determined the CPA Report was an audit, she cites to the Appendix at page 13. At the end of the sentence where the District Court makes a statement concerning the report being an audit, there is a footnote in which the District Court notes that the report was reviewed

by the State of Delaware Office of Auditor of Accounts, and that the State Auditor concurred with the findings of the CPA Report, and referred the case to the Office of Attorney General for the State of Delaware for review and any further action.

Petitioner also argues the District Court wrongfully concluded the CPA Report determined Petitioner violated College policy. Whether the CPA Report concluded policy was breached was not the issue presented to the hearing officer, or the District Court.

Stripped to its essential element, Petitioner contends the CPA Report is flawed because, although she misappropriated College resources, the CPA Report reached incorrect conclusions as to the magnitude of the misappropriation. The hearing officer found cause for termination based upon misappropriation of thousands of dollars of personal time and material of the College. *Johnson I*, 2007 1697276, at *8. Whether Petitioner's misappropriation was in the amount of $1,000, $2,000 or $15,000 is immaterial. In all events, there was cause to terminate.

Petitioner asserts the District Court made findings of fact and weighed evidence (Pet. 32), and contends the Third Circuit "impliedly" weighed evidence as well. Neither court found facts, or weighed evidence. To the contrary, the courts below reviewed the decision to grant summary judgment in a light most favorable to Petitioner, *Johnson II*, 299 Fed. Appx. 139 at 142; *Johnson I*, 2007 WL 1697276, at *3, and based on the limited standard of review applicable to a substantive due process claim. The Court of Appeals stated:

"Johnson also claims that the District Court failed to properly apply the summary judgment standard. We find nothing to support this claim." 299 Fed. Appx. 139 at n.3.[4]

In addition, Petitioner contends the District Court construed disputed facts in favor of the College by finding that Petitioner's abusive conduct continued through 2004 and that Petitioner was antagonistic to the College's new IT policy. The evidence presented to the hearing officer focused on Petitioner's financial misconduct. Evidence of her abusive treatment of employees was offered for the limited purpose of explaining why employees did not initially report the misconduct. Whether Petitioner was antagonistic to the College's new IT policy has nothing to do with whether the hearing officer received substantial evidence to conclude she engaged in financial improprieties.

Petitioner also alleges the District Court found that the "failure" by the College to provide Petitioner with affidavits of witnesses was irrelevant. This was not a finding of fact that resulted from weighing evidence. Rather, it was plain that the rules of procedure adopted for Petitioner's termination hearing far exceeded the limited right to receive affidavits which was provided for in her employment agreement. No weighing of evidence was necessary to reach this conclusion. The Court of Appeals reached the same conclusion. 299 Fed. Appx 139 at *142.

4. The contention that the Court of Appeals "impliedly" weighed evidence is at odds with the standard of review, which exercised plenary review of the district court's grant of summary judgment. *Matreale v. New Jersey Dep't of Military & Veterans Affairs*, 487 F.3d 150, 152 (3d Cir. 2007).

Finally, Petitioner claims the College "impliedly" told the College community that Petitioner committed an act of wrongdoing when she was put on paid administrative leave, and the College community was informed of this fact. This is essentially the same "stigma" argument she advanced in her complaint, but did not address in response to the College's motion for summary judgment, and did not address on appeal to the Third Circuit. Moreover, the argument that placing her on paid administrative leave "stigmatized" her collides with well-established law in the Third Circuit. *See, e.g., Edwards v. California Univ. of Pa.*, 156 F.3d 488, 492 (3d Cir.1998), *cert. denied*, 525 U.S. 1143 (1999). In *Edwards*, the Third Circuit heard an appeal from a teacher who was suspended with pay and later brought suit alleging, *inter alia*, he was deprived of a protected liberty interest because a suspension harmed his reputation. Petitioner makes the same argument. The District Court in *Edwards* holds "because Edwards was suspended with pay, he cannot prove that he was deprived of a property interest deserving due process guarantees." *Id.* On appeal, the Third Circuit agreed, stating "'[s]tigma to reputation alone, absent some accompanying deprivation of present or future employment, is not a liberty interest protected by the fourteenth amendment.'" *Id.* (citing *Robb v. City of Philadelphia*, 733 F.2d 286, 294 (3d Cir.1984) and *Sturm v. Clark*, 835 F.2d 1009, 1012 (3d Cir. 1987)) (explaining that the Supreme Court requires "both damage to reputation and the extinguishment of government employment as a predicate for due process protection."). Petitioner alleges no liberty interest other than harm to her "reputation," and she was merely suspended with pay, not terminated, prior to her pre-termination hearing.

See Id. at 492 (stigma alone does not violate an employee's liberty interest).[5] Thus, Petitioner's liberty interest was not violated.

V. PETITIONER RECEIVED MORE PROCESS THAN SHE WAS DUE UNDER THE DUE PROCESS CLAUSE, OR HER EMPLOYMENT AGREEMENT.

Petitioner contends the courts below erred in granting and affirming summary judgment on her procedural due process claims. In reaching this conclusion, Petitioner misconstrues both the undisputed facts and the well settled law.

A. When A Petitioner Is Placed On Paid Administrative Leave With Full Pay And Benefits, She Is Not Subject To Discipline Such As Would Provide Her With Grievance Rights Under Her Employment Contract

Petitioner contends her placement on paid administrative leave pending the completion of an investigation constituted discipline, and the College's failure to entertain her grievance deprived her of due process. Petitioner refers to the College's employee handbook (the "Handbook") in arguing that she should have been afforded an opportunity to file a grievance when she was placed on paid administrative leave

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5. This rule only makes sense. Otherwise, every time that an employee is placed on leave there would be an allegation that the act of putting the employee on leave stigmatized the employee.

pending an investigation. Petitioner was not entitled to grieve being placed on paid administrative leave with benefits because the paid leave was not an act of discipline. Petitioner was not reprimanded.

Courts consistently recognize the placement of a public employee on paid leave does not deprive the employee of a property right. *See Edwards*, 156 F.3d at 492 (placement of tenured professor on paid leave did not implicate due process concerns); and *Jerrytone v. Musto*, 167 Fed. Appx. 295, 301 (3d Cir. 2006) (placement of teacher on paid suspension without prior hearing was not violation of procedural due process). Placing a public employee on administrative leave with pay has been blessed by this Court as an effective means of dealing with interim pre-termination issues without infringing on the employee's rights. Indeed, in *Cleveland Bd. of Educ. v. Loudermill*, the Court noted a public employer can "avoid the [due process] problem by suspending [the public employee] with pay." 470 U.S. 532, 544-45 (1985).

B. A Termination Process Is Adequate When It Provides Notice And An Opportunity To Be Heard By An Impartial Decision Maker

Generally, Petitioner was entitled to "oral or written notice of the charges . . . , an explanation of the employer's evidence, and an opportunity to present his side of the story." *Loudermill*, 470 U.S. at 546. The District Court found the process provided to Petitioner satisfied the requirements of the 14th Amendment and her employment contract. Indeed, the District Court determined Petitioner received a list of the College's witnesses 11 days in advance, over 1,000 pages of

documents in advance requested by her counsel, notice of the reason for her termination via a copy of the report detailing her infractions two and one half months before the hearing, all materials and demonstratives in advance relied upon by the College, and the ability to call and cross examine witnesses and present evidence. The District Court also noted Petitioner had counsel, testified, presented seven witnesses, and offered 47 exhibits. *Johnson I*, 2007 WL 1697276, at *8. Importantly, she received a decision made by an impartial decision maker, retired Delaware Superior Court Judge Bifferato, who heard testimony and reviewed exhibits. *Id.* The District Court determined Judge Bifferato was an impartial hearing officer. *Id* at n.74. The College agreed to be bound by Judge Bifferato's decision. *Id.* at *7. The record overwhelmingly supports the District Court's conclusion Petitioner was afforded adequate procedural due process as follows:

> [Petitioner] received ample notice of the charges and had a reasonable opportunity to prepare a response. [Petitioner] was aware that her activities were under investigation more than six months prior to the hearing. Two and a half months prior to the hearing, [Petitioner] received the [CPA] Report which outlined the allegations of financial abuse which were the basis for her dismissal. Two weeks before the hearing, the College provided notice of the witnesses it was going to call, and days before, the College offered all of the materials and demonstratives used at the hearing. Therefore, notice was

> sufficient as it provided the nature of the charges and the evidence against her, and was timely under the circumstances of the case.

Id. at *8.

In short, Petitioner received process which exceeded the minimal due process required by the Due Process Clause of the 14th Amendment, and far more process than was due under her contract and the termination procedures in place prior to the adoption of revised termination procedures on April 26, 2005.

1. Petitioner Received Notice Of The Charges

Petitioner's claim she did not have notice of the charges, and that the allegations were vague (Pet. 25), is at war with record. Notice is sufficient if it apprises the vulnerable party of the nature of the charges and general evidence against him, and if it is timely under the particular circumstances of the case. *See Goss v. Lopez*, 419 U.S. 565, 581 (1975); *Gniotek v. City of Philadelphia*, 808 F.2d 241, 244 (3d Cir. 1986), *cert. denied*, 481 U.S. 1050 (1987); *Morton v. Beyer*, 822 F.2d 364, 371 (3d Cir. 1987) (stating that an employee must be apprised of the nature of the allegations before or at the time the hearing begins). Here, Petitioner was informed of the nature of the allegations well in advance of the June 29, 2005 termination hearing, including the following:

1. On March 7, 2005, Petitioner's counsel was informed the College was looking into Petitioner's involvement in certain financial irregularities. (A126-127.)

2. On March 16, 2005, Petitioner's counsel was informed the financial irregularities concerned the use of College resources in connection with Petitioner's large family reunion and questionable purchases. (A128-129.)

3. On April 27, 2005, the College provided Petitioner's counsel with a notice of intent to terminate detailing the reasons for the notice by incorporating the CPA Report by reference, as well as the Rules of Procedure adopted by the Trustees on April 26, 2005. (A109.) The April 27, 2005 letter also indicated that Petitioner's administration by fear and intimidation caused Petitioner's misconduct to remain undetected. (*Id.*)

4. In a May 5, 2005 letter, Petitioner's counsel concedes she is on notice of the allegations concerning her financial mismanagement, and seeks information regarding her administration by fear and intimidation. (A132-133.)

5. On May 6, 2005, the College's counsel wrote to Petitioner's counsel and informed him that Petitioner's administration by fear and intimidation included privately and publicly humiliating numerous College employers in a loud and abusive manner, including frequently accusing employees of being incompetent and threatening to fire employees. (A134-135.)

6. On June 10, 2005, the College provided answers to Petitioner's first set of discovery requests which she filed in this parallel lawsuit.

7. On June 16, 2005, the College provided responses to Petitioner's second set of requests for production filed in the parallel lawsuit.

8. On June 23, 2005, Petitioner's counsel wrote to the College's counsel to confirm the issues to be presented at the termination hearing. (A149-150.)

9. On June 27, 2005, the College's counsel wrote to Petitioner's counsel and informed him that Petitioner's administration by fear and intimidation would not be a basis for her termination. (A151-152.)

10. Prior to the termination hearing, the College identified its witnesses (A496-497), provided over 1,000 pages of documents requested by Petitioner's counsel, and provided copies of the College's termination hearing exhibits.

2. Petitioner Received An Explanation Of The College's Evidence In Advance

Petitioner contends she did not receive enough information in advance of the termination hearing. Due process requires "only that such descriptive explanation be afforded as to permit [the plaintiff] to identify the conduct giving rise to the dismissal and thereby to enable [her] to make a response." *Linton v. Frederick County Bd. of County Comm'rs*, 964 F.2d 1436, 1440 (4th Cir. 1992).[6] Petitioner certainly knew the reasons for her termination, which were set forth in the CPA Report

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6. Petitioner's assertions regarding a contractual right to specific evidence are not only contrary to the well established standards, but they are also inconsistent with the record. Indeed, substantial notice was provided which satisfies both her contract and the due process clause because the CPA Report, which outlined the charges against her, was incorporated by reference into the notice of intent to terminate.

incorporated by reference into the notice of intent to terminate. In addition to complying with the request of Petitioner's counsel for over 1,000 pages of documents, Petitioner's counsel received the College's termination hearing exhibits 2 days prior to the hearing, and the College identified its witnesses 12 days prior to the termination hearing. (A281-2; A284; A504.) The College provided affidavits the day before the termination hearing commenced. (A505.) *See Belas v. Juniata County Sch. Dist.*, 202 Fed. Appx. 585, 587 (3d Cir. 2006) (finding as "spurious" a dismissed school principal's claim that she did not receive documents from the school board until it was time to begin her case and that she was not provided with a bill of particulars setting forth in greater detail the 20-page document containing charges against her).

3. Petitioner Received An Opportunity To Present Her Side Of The Story To An Impartial Decision Maker

A well-respected retired Judge was appointed as the impartial decision maker, and the Trustees of the College agreed to be bound by his decision. Petitioner was represented by experienced counsel who cross-examined the College's witnesses, and presented witnesses and exhibits at a two-day hearing transcribed by a court reporter.

Petitioner contends she was not able to prepare a defense because she was instructed not to visit any College facilities, not to participate in any college functions, and not to discuss the subject matter of the investigation with any present or former employees.

Petitioner fails to mention that, once the notice of intent to terminate was provided on April 27, 2005, Petitioner was free to contact such persons during the two month period that preceded the hearing. Indeed, her counsel contacted "various" employees and former employees before the termination hearing, and presented many of them as witnesses.

Petitioner claims that in the days leading up to the June 29, 2005 hearing, she took issue with the fact she did not have subpoena power to compel witnesses favorable to her, that witnesses may suffer retaliation, that there was no information provided regarding instances of her abusive or inappropriate behavior, and that she had not received the College's evidence in advance. She offers no authority for her claim of a right to subpoena witnesses for an administrative termination hearing. There is no evidence of retaliation. Her abusive and inappropriate behavior was offered for the limited purposes of explaining why employees did not "blow the whistle" on her misconduct. In advance of the hearing, Petitioner was informed that her administration by fear and intimidation would not be a basis for her termination. (A151-152.) She was advised of the general nature of the evidence which would be offered on this point.

Petitioner inaccurately states that the College refused to guarantee that it would not retaliate against Petitioner's witnesses. On June 17, 2005, the College offered to send each employee Petitioner's counsel was attempting to communicate with a letter providing assurances there will be no retaliation for cooperating with Petitioner's counsel, or testifying at the

termination hearing. (A498.) The College repeated this offer on June 22, 2005 rejecting Petitioner's request for a public statement to all employees of the College that there will be no retaliation. (A502-503.) Petitioner's counsel finally accepted the College's offer shortly prior to the hearing.

Petitioner relies upon *Arnett v. Kennedy*, 416 U.S. 134 (1974) for the proposition that she had a right to marshal and adduce her own evidence concerning whether she committed the charged misconduct, whether the investigation was fair, unbiased and complete, and whether she had violated College policy. *Arnett* does not stand for this proposition. To the contrary, Petitioner was entitled to "oral or written notice of the charges . . . , an explanation of the employer's evidence, and an opportunity to present his side of the story." *Loudermill*, 470 U.S. at 546. Moreover, as a factual matter, her claim that she could not marshal her own evidence because she "could not talk to any of the College personnel and could not interview them for her own defense" is false. As set forth previously, once the notice of intent to terminate was provided on April 27, 2005, Petitioner was thereafter free to contact such persons, and she did so. Similarly, her statement that she was precluded from adducing evidence to rebut the "fraudulent proof" against her (Pet. 27) is false. The District Court determined Petitioner received a list of the College's witnesses 11 days in advance, *Johnson I*, 2007 WL 1697276, at *7, over 1,000 pages of documents in advance requested by her counsel, *Id.*, notice of the reason for her termination via a copy of the report detailing her infractions two and one half months before the hearing (*Id.*), all materials and demonstratives in

advance relied upon by the College, *Id.*, and the ability to call and cross examine witnesses and present evidence. *Id.* at *8. The District Court also noted Petitioner had counsel, testified, presented seven witnesses, and offered 47 exhibits. *Id. See also* 299 Fed. Appx. 139 at 142 ("Johnson was represented by counsel, and was able to test the truthfulness of the accusations against her. Johnson testified on her own behalf and proffered 6 witnesses and 47 exhibits.")

C. Providing Petitioner The Right To Cross-Examine And Present Witnesses Replaced And Exceeded Her Limited Right to Receive Affidavits

Petitioner claims she had a property interest in the termination process which existed before the College dramatically expanded her due process rights, including the right to receive affidavits of witnesses. On April 26, 2005, upon recommendation of counsel, the College's Trustees adopted Rules of Procedure for the Conduct of Termination Proceedings ("Rules of Procedure"). The Rules of Procedure provide the following procedural rights:

1. Notice of the reasons for termination.

2. A hearing before an independent, impartial Hearing Officer.

3. The right to confront and cross-examine witnesses testifying under oath.

4. The creation of a stenographic record.

5. The burden of the College to establish one or more reasons for termination by a preponderance of the evidence.

6. The preparation of a written decision by the Hearing Officer.

7. The decision of the Hearing Officer is final.

Johnson II, 299 Fed. Appx. at 141 n. 4. But for the adoption of the Rules of Procedure, the hearing would have been controlled by Petitioner's Employee Master Contract, and Section 12.02 of the College's Personal Policy Manual. Thus, Petitioner would have been limited to the following procedural rights:

1. Notice of the reasons for termination, including any act or course of conduct which constitutes a reasonable hazard to the health, safety and well-being of employer.

2. Affidavits from persons with knowledge supporting termination.

3. A hearing presided over by the College's Chief Legal Counsel in which neither the employer, nor the employee, is obligated to produce witnesses or be subject to cross-examination.

4. The College's Chief Legal Counsel determines whether witnesses may attend the hearing.

5. The Chief Legal Counsel submits a recommendation to the applicable Vice-President and Campus Director for final determination. (A175-A178; A290; A163-A164.)

In the context of hearing procedures which did not require that the College produce witnesses at the termination hearing, the Employee Master Contract required that the College provide affidavits of persons having knowledge of the cause for termination. The College adopted rules requiring the production of witnesses, as well as the right to cross-examine. Petitioner nevertheless insisted the College provide affidavits. The College provided affidavits the day before the termination hearing commenced, not the day of the hearing, as alleged. (A505-A506.)

Petitioner alleges she was deprived of affidavits in advance of the termination hearing because the affidavits were delivered the day before the termination hearing. To begin with, public employees have no right to pre-termination discovery. *Ashton v. Whitman*, 94 Fed. Appx. 896, 900-901 (3d Cir. 2004)

> Recognizing the limited purpose of pre-termination proceedings, courts have held that due process does not require an employer to provide every piece of evidence relevant to an employee's termination . . . . We conclude that requiring mandatory disclosure of material, exculpatory evidence prior to termination "would intrude to an unwarranted extent on the government's interest in quickly removing an unsatisfactory employee."

(quoting *Loudermill*, 470 U.S. at 546); *see also Wells v. Dallas Ind. Sch. Dist.*, 793 F.2d 679, 683 (5th Cir. 1986)

> When an administrative termination hearing is required, federal constitutional due process

> demands either an opportunity for the person charged to confront the witnesses against him and to hear their testimony or a reasonable substitute for that opportunity. One who is present, who sees and hears the witnesses against him, has notice of who they are and what they maintain before he must meet them with his case; his confrontation rights are satisfied . . . . The authorities upon which [plaintiff] relies to demand names and summaries of testimony in advance *plus* confrontation are cases in which there was no confrontation and we required the other as a substitute.

(emphasis in original). *NLRB v. Valley Mold Co., Inc.*, 530 F.2d 693, 695 (6th Cir. 1976) ("[P]arties to judicial or quasi-judicial proceedings are not entitled to discovery as a matter of constitutional right."); *Galvin v. New York Racing Ass'n*, 70 F. Supp. 2d 163, 176 (E.D.N.Y. 1998) (where plaintiff complained of a lack of due process in a hearing resulting in license suspension, the Court states: "The exact evidence to be presented need not be included in the notice, so long as the allegations are sufficient to alert the accused to the misconduct with which he is being charged.") (citing *Patterson v. Ramsey*, 413 F. Supp. 523, 536 (D. Md. 1976), *aff'd*, 552 F.2d 117 (4th Cir. 1977)).

Petitioner had no reasonable expectation the affidavits were to be provided in advance of the hearing for use in preparing for the hearing. The Employee Master Contract and the Personnel Handbook provide that the affidavits were to be used as evidence in support

of termination rather than a means of providing notice of the reasons for termination. Indeed, the Employee Master Contract and the Personnel Handbook are silent as to whether the affidavits were to be provided at the termination hearing or in advance thereof. Petitioner's expectation that the purpose of the affidavits was to provide notice ignores the fact the affidavits were to be presented at a termination hearing in lieu of presenting witnesses. Thus, the only reasonable expectation was that the affidavits would be presented at a termination hearing. There is no support for the assertion the affidavits were given "too late."

D. There Is No Procedural Due Process Violation Where The Employer Provides The Employee Notice Sufficient To Alert The Employee Evidence Will Be Presented At The Termination Hearing Concerning Administration By Fear And Intimidation, And Such Conduct Is Not A Basis For Termination

Petitioner's contention she did not receive information in advance concerning her administration by fear and intimidation is at odds with the record, and disregards the fact that Petitioner was not terminated because she administered the campus through fear and intimidation.

1. Petitioner Was Not Terminated For Her Administration By Fear And Intimidation

Evidence of Petitioner's administration by fear and intimidation was merely offered to explain why employees with knowledge of her misconduct did not

disclose it until she was placed on paid leave. On June 27, 2005, the College's counsel wrote to Petitioner's counsel and informed him that Petitioner's administration by fear and intimidation (just like the information concerning Petitioner's conduct at the November 19, 2004 meeting) would not be a basis for her termination. Additionally, administration by fear and intimidation is not one of the reasons for termination (*i.e.*, use of College employees to perform personal work at great expense to the College, use of College materials for personal matters, and use of the State credit card for personal purchases) identified by Judge Bifferato in his hearing officer's report. Indeed, the Court of Appeals specifically states: "An impartial hearing examiner, retired Judge Vincent Bifferato, concluded that Johnson had abused her position by using College personnel and materials for personal matters and that she had abused the use of her College-issued credit card." 299 Fed. Appx. at 141. There is no mention of her being terminated for her fear and intimidation. Therefore, Petitioner's claim she did not receive adequate notice of her administration by fear and intimidation, even if true, is irrelevant.

2. Petitioner Knew In Advance What Was The Nature Of Her Conduct That Amounted To Fear And Intimidation

Petitioner's claim she was not aware of the nature of the allegations concerning her administration by fear and intimidation collides with the record. On June 27, 2005, the College's counsel informed Petitioner's counsel that:

> In response to your request for specifics concerning allegations of abusive conduct, I

> indicated that the College's witnesses will generally state that Dr. Johnson was frequently loud and abusive in reprimanding employees, and that Dr. Johnson threatened to terminate employees on several occasions. I also indicated that because such conduct on the part of Dr. Johnson occurred over a number of years, was frequent, and employees that witnessed such conduct did not maintain diaries or logs, we cannot, for the most part, provide specifics concerning such a course of conduct. Later today, or tomorrow morning, you will be receiving the affidavits you requested which will provide somewhat more detail.

(A151-A152.)

Even assuming Petitioner was terminated for managing through the use of fear and intimidation, notice of the exact evidence to be presented is not required ". . . so long as the allegations are sufficient to alert the accused to the misconduct with which he is being charged." *Galvin*, 70 F. Supp. 2d at 176 (citing *Patterson*, 413 F. Supp. at 536.). The notice to Petitioner met this test.

CONCLUSION

For the reasons set forth in this brief, the Respondent respectfully request that the Court deny certiorari.

Respectfully submitted,

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